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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1205

AMERICAN AIRLINES, INC.,
TRANS WORLD AIRLINES, INC., *Petitioners*

v.

WORLD AIRWAYS, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Airlines, Inc., and Trans World Airlines, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on December 8, 1976.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. A copy of the slip opinion appears in Appendix II hereof. The decision of the Civil Aeronautics Board,

which the Court of Appeals reversed, appears in Appendix III hereof.[1]

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered December 8, 1976. This petition for a writ of certiorari was filed within ninety days of that date and is thus timely under 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Federal Aviation Act of 1958, as amended, precludes grant of a scheduled-carrier certificate, under section 401(d)(1) or (2), to a supplemental carrier which continues to hold a supplemental-carrier certificate issued under section 401(d)(3) of that Act?

STATUTORY PROVISIONS INVOLVED

Section 401(d)(1), (2) and (3) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1371(d)(1), (2) and (3), is the principal statutory provision involved; it is set forth in Appendix I hereof. Also relevant are sections 401(e)(6), 401(n), 406(b) and 417 of the Federal Aviation Act, 49 U.S.C. §§ 1371(e)(6),

[1] World Airways, Inc. was the petitioner below; intervening on its side were the City of Oakland, the California Board of Port Commissioners and the Oakland Chamber of Commerce. The Civil Aeronautics Board was the respondent below; intervening on its side were American Airlines, Inc., Trans World Airlines, Inc., Northwest Airlines, Inc., United Air Lines, Inc., Eastern Air Lines, Inc., National Airlines, Inc., Pan American World Airways, Inc., and Western Air Lines.

(n), 1376(b) and 1387, which were amended in 1962 at the same time as section 401(d); they are also set forth in Appendix I hereof.

STATEMENT OF THE CASE

The Court of Appeals ruled that supplemental air carriers can also be issued scheduled-carrier certificates. It did so even though the 1962 Amendments of the Federal Aviation Act, which gave the supplementals certificated status, expressly preclude holders of scheduled-carrier certificates being issued supplemental certificates. The Court of Appeals' ruling reversed a unanimous Civil Aeronautics Board interpretation of its statutory powers, and ignored some 15 years of history, during which no carrier has been permitted simultaneously to hold scheduled-carrier and supplemental-carrier certificates. The practical effect of the Court of Appeals's ruling will be to allow the eight companies now holding supplemental certificates to gain scheduled-carrier certificates as well, while prohibiting the 35 companies already holding scheduled-carrier certificates from obtaining supplemental certificates.

Procedurally, this case arose when World Airways, Inc. ("World"), the holder of three supplemental-carrier certificates issued under section 401(d)(3) of the Federal Aviation Act, 49 U.S.C. § 1371(d)(3), applied to the Civil Aeronautics Board for a scheduled-carrier certificate under section 401(d)(1) of the Act, 49 U.S.C. § 1371(d)(1), to engage in scheduled air transportation in the New York/Washington-Los Angeles/San Francisco transcontinental markets. World moved for an expedited hearing, attaching materials on how it proposed to operate the routes and the fares it would charge, and making plain that World would *not* be wil-

ling to surrender its supplemental-carrier certificates if granted the requested scheduled-carrier certificate.

Various carriers, including American Airlines, Inc., and Trans World Airlines, Inc., argued that the Board should dismiss World's application because, as a matter of law, the Board could not grant "dual certification," *i.e.*, could not allow one company to hold both scheduled and supplemental certificates. After briefing and oral argument on this threshold legal issue, the Board unanimously decided that

> "Congress intended . . . to prevent the same carrier from simultaneously holding certificates authorizing regular route and supplemental air transportation." (Order 76-1-88, p. 5)

The Board rested its statutory interpretation on the history leading up to the 1962 Amendments, on the express language employed in those Amendments to create within several sections of the Act a class of certificated supplemental carriers, and on Congressional materials accompanying their passage.[2] The Board found confirmation of its interpretation in post-enactment history, as well as in the pre-1962 Board policy against dual certification (expressly noted in the Conference Committee Report on the 1962 Amendments). The Board rejected World's argument that a "plain meaning" rule required a different result.

On review of the Board's dismissal of World's application, the Court of Appeals agreed that the issue could not be resolved by a "plain meaning" approach (Slip Op. p. 13, n. 8), but reached a statutory interpretation diametrically opposite that of the Board.[3] It

[2] Public Law No. 87-528, 76 Stat. 143.

[3] The Court of Appeal's jurisdiction to review the Board's order rested on section 1006 of the Federal Aviation Act, as amended, 49 U.S.C. § 1486.

did so by finding that the "central objective of the Federal Aviation Act is to promote regulated competition . . .," that the "primary means" to accomplish this is "the certification process," and that it would take "persuasive evidence" to establish that "the 1962 amendments were intended to preclude Board consideration of applications from an entire class of potential entrants into the market for scheduled service." (Slip Op. p. 6). The Court of Appeals read the express prohibition against holders of scheduled-carrier certificates being granted supplemental-carrier certificates as evidencing only "the limited statutory purpose of protecting supplemental carriers from domination by regular carriers," (Slip Op. p. 20), and quoted a former Senator's words, as a witness during hearings on the 1962 Amendments, that the supplementals are "the true small businesses of civil aviation." (Slip Op. p. 20, fn.). In this approach the Court of Appeals seemed oblivious to the fact that World Airways, Inc., is already a far larger company, measured by the relevant standard of system revenue passenger miles, than some 15 other companies holding scheduled-carrier certificates, including such government-subsidized scheduled carriers as Hughes Airwest, Frontier Air Lines, North Central Air Lines, Ozark Air Lines, Piedmont Air Lines, Southern Air Lines, and Texas International Air Lines.[4]

The Court of Appeals expressly refused to decide how the Civil Aeronautics Board could exercise its stat-

[4] CAB Handbook of Airline Statistics, 1975 Supplement (November 1975), p. 2, Table 2s "Comparative Traffic Data [In Order of Rank] Certificated Air Carriers, System Operations: Calendar Year 1974."

utory responsibility, if the public convenience and necessity require, to alter or amend World's three supplemental-carrier certificates (which necessitates their reissuance) once World holds a scheduled-carrier certificate. (Slip Op. p. 21, n. 13). And the Court of Appeals simply presumed that the Board would first consider the supplemental-certificate application of a truly new entrant which sought both scheduled and supplemental authority "if the route authorization at stake would not be significant enough to raise a danger of undue domination." (Slip Op. p. 21). The Board, in contrast, had decided:

> "... we think it inconceivable that Congress could have meant that such arbitrary procedural circumstances should control the fundamental role that a carrier should play in the air transportation system." (Order 76-1-88, p. 7).

At no point in its opinion did the Court of Appeals refer to any deference to be shown by it to the agency's interpretation of its own statute. It also made no reference to the fact that the Board's interpretation had previously been presented to the relevant Congressional committee, in Board testimony on bills (never enacted) to permit dual certification. And while obviously disagreeing with the unanimous Board's reading of its own statute, the Court of Appeals did not attempt to demonstrate that the Board's interpretation was "arbitrary or contrary to an ascertainable legislative will,"[5] or that "there are compelling indications that it is wrong."[6]

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[5] *Trans World Airlines, Inc.* v. *C.A.B.*, 128 U.S.App.D.C. 126, 385 F.2d 648, 660 (1967), *cert. denied*, 390 U.S. 944 (1968).

[6] *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 121 (1973).

REASONS FOR GRANTING THE WRIT

This Court should exercise its discretionary jurisdiction to review the decision of the Court of Appeals in this case. The court below has decided an important issue of Federal law that should be finally resolved by this Court, namely a basic interpretation of the Civil Aeronautics Board's authority to certificate classes of carriers, "of importance for future guidance of the Board in carrying out its congressionally imposed functions." *Civil Aeronautics Board* v. *State Airlines,* 338 U.S. 572, 575 (1950).

Furthermore, the court below has decided a federal question in a way in conflict with applicable decisions of this Court on deference to an agency's interpretation of its own statute. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 121 (1973); *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381 (1969).

I. THE COURT OF APPEALS DECIDED AN IMPORTANT ISSUE OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT.

This Court was previously confronted with a Court of Appeals' interpretation of section 401(d)(1) and (2) of the Federal Aviation Act which was different from the Board's on the issue of the latter's power to grant routes not expressly applied for. This Court found that issue worthy of certiorari "because a final determination of the questions involved, particularly those involving interpretation of the Act, is of importance for future guidance of the Board in carrying out its congressionally imposed function." *Civil Aeronautics Board* v. *States Airlines,* 338 U.S. 572, 575 (1950).

The issue here—of whether there are to be two separate *classes* of carriers, or merely two different kinds of certificates both of which may be held by the same company—is of even greater importance, for it goes to the very heart of the Congressional scheme for economic regulation of air transportation. In essence, the court below felt that "competition" would be enhanced by broadening the class of possible entrants into scheduled service, whereas the Board believed that Congress had determined that creation of a separate and distinct class of specialized companies (the supplemental carriers) would best promote true competition to serve the public.

The importance of this issue is evidenced by the previous, unsuccessful attempts to have Congress change the statute to read in part as the court below now interprets it. For example, in 1972, S. 2548 was pending in the 92nd Congress, 2d Session. In testimony before the Aviation Subcommittee of the Senate Commerce Committee, CAB Chairman Secor Browne testified:[7]

> "S. 2548 would amend Section 401(d)(3) of the Federal Aviation Act. That section by its terms presently precludes scheduled-carriers from holding supplemental certificates. S. 2548 would delete the language containing that restriction. . . .
>
> The real thrust of S. 2548 seems to be in two other directions. One is to enable supplemental carriers to obtain scheduled authority. The other is to permit mergers between scheduled carriers and supplementals.

[7] Hearings on S. 2540, S. 2549, and S. 3513 Before the Aviation Subcommittee of the Senate Commerce Committee, 92nd Cong., 2d Sess. (1972).

> It's widely assumed that the Board reads section 401(d)(3) as precluding the grant of a scheduled route to a supplemental carrier, and as prohibiting mergers between supplemental and scheduled carriers. The Board hasn't passed on these issues but for purposes of this testimony, I'll make those assumptions too."

Chairman Browne concluded:

> "Having two classes of carriers makes our life difficult, but that is what we think the air transportation system now requires * * * All these bills present basic questions of policy for the Congress. We stand ready to carry out the decision of the Congress whatever it may be."

Congress did *not* enact the provisions of S. 2548 abolishing the distinction between scheduled and supplemental carriers Congress' refusal was in accordance with the position on the proposed legislation taken by the Board, as it was then constituted.

In 1975-76, as the current Board pointed out in its Brief to the court below, legislation was again introduced to amend Section 401 so as to permit "dual certification."[8] CAB Chairman John Robson this time testified in favor of a statutory change to permit dual certification. But as World Airways noted in a supplemental memorandum to the court below on October 6, 1976, that proposed legislation was *not* enacted, dying when the 94th Congress adjourned *sine die*.

Yet what Congress had refused to do, the court below did in part on December 8, 1976 in its decision in

[8] H.R. 10261 and S. 2551, 94th Cong., 1st Sess. noted in Brief for Respondent, p. 6, as well as S. 3364, S. 3536, S. 3830 and H.R. 14604, 94th Cong., 2d Sess., as noted in World Airways' Supplemental Memorandum of October 6, 1976 to the court below.

this case, permitting companies that first acquire a supplemental certificate to obtain dual certification, but still denying the opportunity to companies which first obtain a scheduled certificate.

The *continuing* importance of the issue is attested by the Board's Order 77-1-94, January 14, 1977, which sets World's application for hearing in a newly instituted *Transcontinental Low-Fare Route Proceeding,* CAB Docket 30356, that contemplates the filing of competing applications.

That this Court's *future* "guidance of the Board" is needed can also be seen from the subsidiary questions raised by the lower court's interpretation, but not adequately answered by the lower court's opinion. For example, if World's application for a scheduled-carrier certificate for a "transcontinental low-fare route" is granted and the certificate is issued, then World will be "holding a certificate under paragraph (1)" of section 401(d). At that point, the Board is expressly precluded by section 401(d)(3) from *issuing* a supplemental certificate to World, yet World's temporary certificates must be periodically *re-issued* under section 401(d)(3), and any alteration or amendment of its permanent certificates, found required by the public convenience and necessity under section 401(g), must ultimately result in *issuance* of a new certificate under section 401(d)(3). The court below merely noted: "It is unnecessary to decide this question, given the posture of the case before us." (Slip Op. p. 21, n. 13). But the Board cannot avoid this issue, and this Court's guidance is needed to help the Board in the future "in carrying out its congressionally imposed functions."

Moreover, until resolved by this Court, the Board must cope with the numerous statutory anomalies that the court below first refused to recognize but then left "to the Board, in the first instance," to resolve by "the interpretation which will fulfill the purposes of the Act." (Slip Op. 13). The Board described these anomalies as follows:

> "To begin with, Section 401(e)(6) of the Act has authorized those carriers holding certificates issued under Section 401(d)(1) or (2) to engage in charter trips and special services without regard to the points named in their certificates. The 1962 supplemental air carrier legislation amended this section to deny supplemental air carriers this authority. Section 401(n) of the Act either authorizes, or imposes, a number of special requirements relating to supplemental air carriers that are not applicable to route carriers. These include provisions relating to insurance, minimum service, and "continuing fitness." Section 406(b) had authorized the payment of subsidy for all carriers. That section was also amended by the 1962 supplemental legislation to preclude subsidy for supplemental air carriers. If World were to receive a certificate under Section 401(d)(1) or (2) and at the same time was permitted to retain its supplemental certificate, it would still be a supplemental carrier by definition. The wholly anomalous result would be that the carrier would at one and the same time be (a) granted and denied Section 401(e)(6) authority; (b) subject to and not subject to Section 401(n) requirements; and (c) eligible and not eligible for subsidy."

Unlike the court below, the Board concluded:

> "We think these sections demonstrate that Congress did not intend to permit the same carrier to

> hold both route and supplemental air carrier certificates. Indeed, no citations are needed for the proposition that statutes are to be construed to avoid unreasonable, let alone absurd, results."

Finally, regardless of whether the lower court's interpretation is correct, there can be no question that it alters a basic element of the statutory scheme for regulating air transportation, far transcends the particular facts of the present case, and involves continuing problems in the administration of a key federal statute. This court should grant a writ of certiorari to settle the basic question once and for all.

II. THE COURT OF APPEAL'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS ON DEFERENCE TO AN AGENCY'S INTERPRETATION OF ITS OWN STATUTE.

The court below showed no deference to the Civil Aeronautics Board's interpretation of its own statute, despite the Board's unanimous view of a Congressional intent diametrically opposite that perceived by the court below. The unanimity of the Board was underscored by the vote of CAB Member Joseph Minetti who was a member of the Board at the time of the 1962 Amendments to the Federal Aviation Act.

The Board's role in the enactment of the 1962 Amendments entitled its views to special deference. As the Board expressed it in its brief to the court below:

> "This, moreover, is not just another dispute over an agency's construction of its own statute. The provisions of the statute involved are the 1962 amendments of the Federal Aviation Act by which Congress undertook to solve the so-called "supplemental air carrier problem." *United Air Lines* v. *C.A.B.,* 97 U.S.App.D.C. 1, 278 F.2d 446, 448

> (1960), *vacated sub nom. All American Airways* v. *United Air Lines,* 364 U.S. 297 (1960). The basic problem was to define the place or role of the supplemental air carriers in the national air transportation system. The Board had been grappling with this problem in a massive evidentiary proceeding instituted in 1951 and concluded eight years later. Its decision was set aside by two decisions of this Court, holding ultimately that the Board had exceeded its statutory power, and it was this which led to the 1962 amendments interpreted by the Board in this case.
>
> In sum, what the Board interpreted here was amendatory legislation specifically directed to a continuing problem with which it was already intimately familiar from extended experience. Moreover, the Board played a major part in the formulation and development of the legislation. Considering (1) that "statutory language necessarily derives much of its meaning from the surrounding circumstances" (*C.A.B.* v. *Delta Air Lines,* 367 U.S. 316, 323 (1961), and (2) that the Board has for so long been so deeply involved in the subject matter and surrounding circumstances of the legislation, and (3) that legislation is even now pending in Congress to amend the statute so as to give the Board clear jurisdiction, this is a most compelling case for keen sensitivity to the principle of judicial deference to the agency's construction." (Brief of the Civil Aeronautics Board in the court below, pp. 8-9).

Yet the court below showed no deference to the Board's decision, and did not even cite a case acknowledging that it owed such deference.[9]

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[9] The decision of the court below, giving no deference to the Civil Aeronautics Board's interpretation of the Federal Aviation Act also conflicts with decisions of that court: *Committee For Open*

The failure of the court below to show deference squarely conflicts with this Court's

> "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction."

Red Lion Broadcasting Co. v. *FCC,* 395 U.S. 367, 381 (1969), quoted in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 121 (1973). This Court's insistence on such deference has been often repeated. See, *e.g., Fry* v. *United States,* 421 U.S. 542, 546, n. 6 (1975); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 431 (1975) (" 'the administrative interpretation of the Act by the enforcing agency' is 'entitled to great deference.' "); *United States* v. *National Ass'n of Securities Dealers,* 422 U.S. 694 (1975) ("consistent and longstanding interpretation by the agency charged with administration of the Act, while not controlling, is entitled to considerable weight."); *Johnson* v. *Robison,* 415 U.S. 361, 367-68 (1974), quoting *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."); *Zemel* v. *Rusk,* 381 U.S. 1, 11 (1965); *Unemployment Compensation Comm'n* v. *Aragon,* 329 U.S. 143, 153 (1946); *Power Reactor Co.* v. *Electricians' Union,* 367 U.S. 396, 408 (1961); *United States* v. *American Trucking Association,* 310 U.S. 534, 549 (1940); *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294, 315 (1933); *Surgett* v. *Lapice,* 8 How. 48, 68, 70 (1850).

Media v. *FCC,* 533 F.2d 1 (D.C. Cir. 1976); *Trans World Airlines, Inc.* v. *CAB,* 385 F.2d 648, 660 (1967), *cert. denied,* 390 U.S. 944 (1968); *Columbia Gas Transmission Corp.* v. *FPC,* 530 F.2d 1056, 1059 (D.C. Cir. 1976); *Continental Air Lines, Inc.* v. *CAB,* 519 F.2d 944, 954-55 (D.C. Cir. 1975) ("particular respect due a 'contemporaneous construction of a statute by men charged with the responsibility of setting its machinery in motion.' ").

This Court should grant a writ of certiorari to resolve the clear conflict between the decision of the court below and this Court's decisions requiring appropriate deference to an agency's interpretation of its own statute.

CONCLUSION

For the reasons set forth herein, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX I

Statutory Provisions Involved

Section 401(d)(1), (2), (3)

(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder.

(3) In the case of an application for a certificate to engage in supplemental air transportation, the Board may issue a certificate, to any applicant not holding a certificate under paragraph (1) or (2) of this subsection, authorizing the whole or any part thereof, and for such periods, as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform the transportation covered by the application and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder. Any certificate issued pursuant to this paragraph shall contain such limitations as the Board shall find necessary to assure that the service rendered pursuant thereto will be

limited to supplemental air transportation as defined in this Act.

Section 401(e)(6)

(6) Any air carrier, other than a supplemental air carrier, may perform charter trips (including inclusive tour charter trips) or any other special service, without regard to the points named in its certificate, or the type of service provided therein, under regulations prescribed by the Board.

Section 401(n)

(n)(1) No certificate to engage in supplemental air transportation, and no special operating authorization described in section 417 of this title, shall be issued or remain in effect unless the applicant for such certificate or the supplemental air carrier, as the case may be, complies with regulations or orders issued by the Board governing the filing and approval of policies of insurance, in the amount prescribed by the Board, conditioned to pay, within the amount of such insurance, amounts for which such applicant or such supplemental air carrier may become liable for bodily injuries to or the death of any person, or for loss of or damage to property of others, resulting from the negligent operation or maintenance of aircraft under such certificate or such special operating authorization.

(2) In order to protect travelers and shippers by aircraft operated by supplemental air carriers, the Board may require any supplemental air carrier to file a performance bond or equivalent security arrangement, in such amount and upon such terms as the Board shall prescribe, to be conditioned upon such supplemental air carrier's making appropriate compensation to such travelers and shippers, as prescribed by the Board, for failure on the part of such carrier to

perform air transportation services in accordance with agreements therefor.

Section 406(b)

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Board, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Board shall take into consideration, among other factors, (1) the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; (2) such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and (3) the need of each such air carrier (other than a supplemental air carrier) for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense. In applying clause (3) of this subsection, the Board shall take into consideration any standards and criteria prescribed by the Secretary of Transportation, for determining the character and quality of transportation required for the commerce of the United States and the national defense.

Section 417

(a) If the Board finds upon an investigation conducted on its own initiative or upon request of an air carrier—

(1) that the capacity for air transportation being offered by the holder of a certificate of public convenience and necessity between particular points in the United States is, or will be, temporarily insufficient to meet the requirements of the public or the postal service; or

(2) that there is a temporary requirement for air transportation between two points, one or both of which is not regularly served by any air carrier; and

(3) that any supplemental air carrier can provide the additional service temporarily required in the public interest; the Board may issue to such supplemental air carrier a special operating authorization to engage in air transportation between such points.

(b) A special operating authorization issued under this section—

(1) shall contain such limitations or requirements as to frequency of service, size or type of equipment, or otherwise, as will assure that the service so authorized will alleviate the insufficiency which otherwise would exist, without significant diversion of traffic from the holders of certificates for the route;

(2) shall be valid for not more than thirty days and may be extended for additional periods aggregating not more than sixty days; and

(3) shall not be deemed a license within the meaning of section 9(b) of the Administrative Procedure Act (5 U.S.C. 1008(b)).

(c) The Board shall by regulation establish procedures for the expeditious investigation and determination of requests for such special operating authorizations. Such procedures shall include written notice to air carriers certificated to provide service between the points involved, and shall provide for such opportunity to protest the application in writing, and at the Board's discretion to be heard orally in support of such protest, as will not unduly delay issuance of such special operating authorization, taking into account the degree of emergency involved.

APPENDIX II

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1072

WORLD AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

CITY OF OAKLAND, CALIFORNIA BOARD OF
PORT COMMISSIONERS AND THE OAKLAND
CHAMBER OF COMMERCE
AMERICAN AIRLINES, INC., ET AL.
NORTHWEST AIRLINES, INC.,
UNITED AIRLINES, INC.,
EASTERN AIR LINES, INC., ET AL., INTERVENORS

Petition for Review of Order of
The Civil Aeronautics Board

Argued April 13, 1976

Decided December 8, 1976

Jerrold Scoutt, Jr., with whom *Frank J. Costello* was on the brief, for petitioner.

Robert L. Toomey, Attorney, Civil Aeronautics Board, wtih whom *James C. Schultz*, General Counsel, *Jerome Nelson*, Deputy General Counsel, and *Glen M. Bendixsen*, Associate General Counsel, Civil Aeronautics Board, were on the brief, for respondent.

Ky P. Ewing, Jr., with whom *Alfred V. J. Prather* was on the brief, for intervenors American Airlines, Inc., and Trans World Airlines, Inc.

J. Kerwin Rooney, Cecil A. Beasley, Jr., and *John C. Smuck* were on the brief, for intervenors City of Oakland, California, Board of Port Commissioners and The Oakland Chamber of Commerce.

James M. Verner and *Ronald B. Natalie* were on the brief, for intervenor Northwest Airlines, Inc.

Arnold T. Aikens and *Michael A. Katz* were on the brief for intervenor, United Air Lines, Inc.

Jerry W. Ryan and *Susan A. Elliott* were on the brief for intervenors Eastern Air Lines, Inc., National Airlines, Inc., Pan American World Airways, Inc., and Western Air Lines, Inc.

Before MCGOWAN, ROBINSON, and WILKEY, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* MCGOWAN.

MCGOWAN, *Circuit Judge*: The sole issue in this case is whether the 1962 amendments to the Federal Aviation Act of 1958, Pub. L. No. 87-528, 76 Stat. 143, should be construed to bar the Civil Aeronautics Board from issuing a certificate for scheduled route authority to an air carrier holding a certificate for supplemental air transportation. The Board has so read the statute. We find such a reading unwarranted, and therefore hold that the Board should have addressed the merits of an application for such authority.

I

On April 2, 1975 petitioner World Airways, Inc., an air carrier certificated to engage in supplemental service within the United States and between the United States and all foreign points except those in Canada and Mexico, filed an application with the Board seeking certification to perform regularly scheduled trans-continental service between Newark and Baltimore on the East Coast and Ontario and Oakland, California on the West. World contemplated a high-density, high-load factor service utilizing "satellite" airports, with a one-way fare of eighty-nine dollars per person. However, World indicated that it would not be willing to surrender its supplemental certificates if granted scheduled route authority. On January 23, 1976 the Board dismissed World's application without reaching the merits, holding that the 1962 amendments preclude issuance of a certificate for scheduled authority to a carrier holding a supplemental certificate. Docket 27693, Order 76-1-88 (Jan. 23, 1976).

Sections 401(d)(1) and (2) of the Federal Aviation Act, as amended, govern the certification of scheduled route authority, that is, authority to provide conventional individually ticketed service. These sections provide that an applicant must be "fit, willing, and able," and that the requested service must be "required by the public convenience and necessity." [1] However, the only

[1] Section 401(d)(1) controls the award of permanent authority, while 401(d)(2) governs temporary certification. These sections provide in full:

> (d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.
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> (2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provision of this chapter and the rules, regulations, and requirements of the Board hereunder.

49 U.S.C. § 1371(d)(1), (2) (1970).

express limitation on who may apply for scheduled route authority is contained in section 401(a), which confines eligibility to "air carriers," defined as "citizens of the United States" within the meaning of section 101(13) of the Act, 49 U.S.C. § 1301(13) (1970). *See* 49 U.S.C. §§ 1301(3), 1371(a) (1970).

The 1962 amendments to the Act added a provision authorizing certification for supplemental air transportation, defined to encompass charter service but not individually ticketed authority. *See* 49 U.S.C. § 1301(36) (1970).[2] This provision, section 401(d)(3) of the Act,

[2] Considerable litigation has taken place with regard to the definition of "charter trips." *See, e.g.*, Saturn Airways, Inc. v. CAB, 483 F.2d 1284 (D.C. Cir. 1973); Pan American World Airways, Inc. v. CAB, 380 F.2d 770 (2d Cir. 1967), *aff'd by an equally divided Court*, 391 U.S. 461 (1968); American Airlines, Inc. v. CAB, 365 F.2d 939 (D.C.Cir. 1966); American Airlines, Inc. v. CAB, 348 F.2d 349 (D.C.Cir. 1965). The overriding principle that has emerged from these cases is that the Board "should never permit 'individually ticketed service to be offered to the general public under the guise of charter.' SEN. REP. No. 688, 87th Cong., 1st Sess. 13 (1961)." Saturn Airways, *supra* at 1288. It should be noted, however, that supplemental air carriers do have the right to seek *temporary* individually ticketed route authority under section 417 of the Act. *See* p. 14 & n.10 *infra*.

includes the requirements that the applicant be "fit, willing, and able" and that the certificated service be "required by the public convenience and necessity," but also includes a limitation—above and beyond section 401(a)—on who is eligible for supplemental certification: the applicant must not be "holding a certificate under paragraph (1) or (2) of this subsection [section 401(d)]."[3] In other words, an air carrier holding scheduled route authority under section 401(d)(1) or (2) is barred from obtaining supplemental authority under 401(d)(3). However, section 401(d)(3) does *not* by its terms forbid a supplemental carrier from acquiring scheduled authority. The issue in this case thus becomes whether the general purposes of the 1962 amendments would be furthered by reading this converse limitation into the Act.

II

At the outset, it is important to note the narrowness of the question before us. We are asked merely to decide whether the Board is statutorily foreclosed from

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[3] Section 401(d)(3) provides in full:

> (d)(3) In the case of an application for a certificate to engage in supplemental air transportation, the Board may issue a certificate, to any applicant not holding a certificate under paragraph (1) or (2) of this subsection, authorizing the whole or any part thereof, and for such periods, as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform the transportation covered by the application and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder. Any certificate issued pursuant to this paragraph shall contain such limitations as the Board shall find necessary to assure that the service rendered pursuant thereto will be limited to supplemental air transportation as defined in this chapter.

49 U.S.C. § 1371(d)(3) (1970).

considering a supplemental carrier's application for scheduled authority. The absence of a statutory bar does not mean, of course, that a supplemental carrier is entitled to scheduled authority. It does mean that its application for such authority is to be evaluated on its merits, with due consideration to be given to all relevant aspects of the public interest, including the applicant's responsibilities as a supplemental carrier.

A central objective of the Federal Aviation Act is to promote regulated competition in the air transportation industry. *See, e.g.*, 49 U.S.C. § 1302 (1970) (public interest standard under the Federal Aviation Act); *Continental Air Lines, Inc. v. CAB*, 519 F.2d 944, 951-55 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 958 (1976). The primary means for achieving this goal is the certification process, in which the Board must consider whether the applicant is "fit, willing, and able" and whether the requested authority would serve the "public convenience and necessity." Consequently, rigid constraints on the Board's ability to consider applications on their merits are generally disfavored. *See, e.g., Civil Aeronautics Board v. State Airlines, Inc.*, 338 U.S. 572, 576-78 (1950).

Against this background, persuasive evidence would be required to establish that the 1962 amendments were intended to preclude Board consideration of applications from an entire class of potential entrants into the market for scheduled service. Our skepticism in this regard is reinforced by the total absence of such a restriction in the express provisions of the legislation. Nevertheless, the Board concluded that the 1962 amendments do not allow "an air carrier to simultaneously hold certificates for regular route and supplemental air transportation," even if the route authority is acquired subsequent to the supplemental authority. Docket 27693, *supra*, at 4. Allowing a supplemental carrier to obtain scheduled au-

thority would, so the Board asserted, produce arbitrary and unreasonable results under several provisions of the amendments. Moreover, the Board stated that the "plain implication" of the 1962 legislation, as well as the thrust of its legislative history, is that Congress intended to create two mutually exclusive classes of carriers, one to engage only in regular air transportation [4] and the other to supply only supplemental service.[5]

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[4] It should be noted that regular carriers, that is, carriers holding scheduled route authority under section 401(d)(1) or (2), may perform charter trips and special services under regulations prescribed by the Board. *See* Federal Aviation Act of 1958, § 401(a)(6), *as amended*, 49 U.S.C. § 1371(e)(6) (1970), *reprinted* in note 6 *infra*. Current regulations permit an unlimited number of "on-route" charter flights, but restrict the frequency and regularity of "off-route" charters. *See* 14 C.F.R. Part 207 (1976). The Board presumably recognizes the "hybrid" character of the service provided by regular carriers but argues, in essence, that applicants must choose between the package of authority comprehended by scheduled route certification and the package of authority offered by supplemental certification.

[5] The Board also gave weight to the fact that prior to the 1962 legislation its policy was to prohibit an air carrier from simultaneously holding both route and supplemental authority. The Board reasoned that "[p]rior administrative policy and practice represents another accepted source of guidance in determining how statutes should be construed and applied." Docket 27693, *supra*, at 7. With all respect, we do not find the Board's pre-1962 interpretation of the Act persuasive support for its reading of the 1962 amendments. It seems reasonable to suppose that a policy formulated at the time the Board was attempting to justify an exemption of supplemental carriers from the provisions of the Act would not survive the establishment of a clear statutory basis for awarding supplemental certificates. Certainly Congress did not think the prior Board policy was incorporated as such in the 1962 amendments: the express prohibition in section 401(d)(3) against acquisition of supplemental authority by a regular carrier would not have been necessary had Congress thought the Board's policy

Although it is clear that Congress intended to authorize certification of a class of air carriers engaging in supplemental service, we do not see any convincing evidence that Congress intended members of this class to be foreclosed from seeking regular route authority. This court's decisions in *American Airlines, Inc. v. CAB*, 235 F.2d 845 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 905 (1957), and *United Air Lines, Inc. v. CAB*, 278 F.2d 446 (D.C.Cir.), *vacated*, 364 U.S. 297 (1960), had cast doubt on the Board's power to certify supplemental service under the statutory scheme in effect prior to the 1962 amendments. In *American Airlines*, we rejected the Board's attempt to grant supplemental air carriers unlimited charter authority, plus authority to offer up to ten individually ticketed flights on any given route per month, through conferral of an exemption from the provisions of the Federal Aviation Act. In *United Air Lines*, we denied the Board's efforts to achieve a similar result through the certification process. The 1962 legislation established a statutory basis for certification and regulation of supplemental service, while preserving the basic structure of the Act and protecting carriers holding certificates for regularly scheduled air service from unregulated competition. As this court concluded in *American Airlines, Inc. v. CAB*, 365 F.2d 939 (D.C. Cir. 1966):

> An overall reading of the legislative history indicates that the three primary purposes of the 1962 legislation were: to eliminate irresponsible supplementals, especially those violating safety regulations; to stabilize the operating authority of the supplementals under certificates, including authority to authorize "charter trips" on a broad enough basis so that through performance of civilian and mili-

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against dual certification was being carried forward by the legislation. We note, moreover, that until the instant litigation the Board had not formally determined the effect of the 1962 amendments upon its prior policy.

> tary charter operations the supplementals might remain viable economic organizations capable of meeting supplemental transportation needs and able to comply fully with safety requirements; *to maintain the regulatory scheme of the Federal Aviation Act* and the protection of the certificated carriers such as petitioners by eliminating *unregulated* individually ticketed point-to-point competition from the supplementals.

Id. at 944-45 (footnote omitted) (emphasis supplied). *See also Pan American World Airways, Inc. v. CAB*, 380 F.2d 770, 777 (2d Cir. 1967), *affirmed by an equally divided Court*, 391 U.S. 461 (1968). Obviously, a congressional desire to establish authority for supplemental service and protect regular air carriers against unregulated competition from the supplementals does not necessarily imply a congressional purpose to shield regular carriers against competition from supplemental carriers which is deemed to be in the public interest after a full hearing by the Board.

We do not think the Board's construction of the amendments is necessary to avoid arbitrary or unreasonable results. Nor do we find sufficient support for its position in the legislative history, or in the language of the 1962 provisions considered in their complete context. The Board cited three sections which deny benefits or impose additional requirements on "supplemental air carriers," and found an anomaly in the fact that a carrier holding both route and supplemental authority would be, at one and the same time, "covered and not covered" by these sections.[6] The intervening Oakland

[6] In the words of the Board:

> . . . Section 401(e)(6) of the Act had authorized those carriers holding certificates issued under Section 401(d)

> (1) or (2) to engage in charter trips and special services without regard to the points named in their certificates. The 1962 supplemental air carrier legislation amended this section to deny supplemental air carriers this authority. Section 401(n) of the Act either authorizes, or imposes, a number of special requirements relating to supplemental air carriers that are not applicable to route carriers. These include provisions relating to insurance, minimum service, and "continuing fitness." Section 406(b) had authorized the payment of subsidy for all carriers. That section was also amended by the 1962 supplemental legislation to preclude subsidy for supplemental air carriers. If World were to receive a certificate under Section 401(d)(1) or (2) and at the same time was permitted to retain its supplemental certificate, it would still be a supplemental carrier by definition. The wholly anomalous result would be that the carrier would at one and the same time be (a) granted and denied Section 401(e)(6) authority; (b) subject to and not subject to Section 401(n) requirements; and (c) eligible and not eligible for subsidy.

Docket 27693, *supra*, at 6.

Section 401(e)(6), as amended, provides:

> (6) Any air carrier, *other than a supplemental air carrier*, may perform charter trips (including inclusive tour charter trips) or any other special service, without regard to the points named in its certificate, or the type of service provided therein, under regulations prescribed by the Board.

49 U.S.C. § 1371(e)(6) (1970) (emphasis added).

Section 401(n) provides in relevant part:

> (n)(1) No certificate to engage in supplemental air transportation, and no special operating authorization described in section 1387 of this title, shall be issued or remain in effect unless the applicant for such certificate or the *supplemental air carrier*, as the case may be, complies with regulations or orders issued by the Board governing the filing and approval of policies of insurance, in the amount prescribed by the Board, conditioned to pay, within the amount of such insurance, amounts for which such applicant or such *supplemental air car-*

rier may become liable for bodily injuries to or the death of any person, or for loss of or damage to property of others, resulting from the negligent operation or maintenance of aircraft under such certificate or such special operating authorization.

(2) In order to protect travelers and shippers by aircraft operated by *supplemental air carriers*, the Board may require any *supplemental air carrier* to file a performance bond or equivalent security arrangement, in such amount and upon such terms as the Board shall prescribe, to be conditioned upon such *supplemental air carrier's* making appropriate compensation to such travelers and shippers, as prescribed by the Board, for failure on the part of such carrier to perform air transportation services in accordance with agreements therefor.

(3) If any service authorized by a certificate to engage in supplemental air transportation is not performed to the minimum extent prescribed by the Board, it may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.

(4) The requirement that each applicant for a certificate to engage in supplemental air transportation must be found to be fit, willing, and able properly to perform the transportation covered by his application and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board under this chapter, shall be a continuing requirement applicable to each *supplemental air carrier* with respect to the transportation authorized by, and currently furnished or proposed to be furnished under, *such carrier's* certificate. The Board shall by order, entered after notice and hearing, modify, suspend, or revoke such certificate, in whole or in part, for failure of *such carrier* (A) to comply with the continuing requirement that *such carrier* be so fit, willing, and able, or (B) to file such reports as the Board may deem necessary to determine whether *such carrier* is so fit, willing, and able.

(5) In any case in which the Board determines the failure of a *supplemental air carrier* to comply with the provisions of paragraph (1), (3), or (4) of this subsection, or regulations or orders of the Board thereunder,

parties (the City of Oakland, the Board of Port Commissioners, and the Oakland Chamber of Commerce) urge us to eliminate this "anomaly" by construing these provisions to apply only to supplemental *operations* rather than to all services performed by an air carrier holding supplemental authority. The Oakland parties support

requires, in the interest of the rights, welfare, or safety of the public, immediate suspension of *such carrier's* certificate, the Board shall suspend such certificate, in whole or in part, without notice or hearing, for not more than thirty days. * * *

49 U.S.C. § 1371(n) (1970) (emphasis supplied).

Section 406(b), as amended in 1962, provides in relevant part:

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Board, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Board shall take into consideration, among other factors, (1) the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; (2) such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and (3) the need of each such air carrier (*other than a supplemental air carrier*) for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the United States Postal Service, and the national defense. * * *

49 U.S.C. § 1376(b) (1970) (emphasis added).

their position by analogy to *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976), in which this court held that a cable television operator can be a common carrier with respect to some activities, but a non-common carrier with respect to others.

We find it unnecessary to pass on the validity of the Oakland parties' interpretation, since we fail to see why the provisions in question raise an anomaly at all. Of course, if the Oakland parties are correct, a supplemental carrier holding route authority would be covered by the 1962 amendments in its supplemental capacity, but not in its route capacity.[7] Being "covered and not covered" in this manner would make perfectly good sense. But even if the references to "supplemental air carriers" were construed to cover all activities by an air carrier holding supplemental authority, these provisions would hardly be irrational. It would not be unreasonable for Congress to deny benefits and impose requirements on supplemental air carriers operating scheduled routes, while granting benefits and waiving requirements for carriers holding only scheduled authority, if Congress felt such a distinction were required to ensure that supplemental air carriers would fully carry out their responsibilities. Thus, we leave it to the Board, in the first instance, to select the interpretation which will best fulfill the purposes of the Act.[8]

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[7] With respect to section 401(e)(6), any eligibility for benefits would flow from the carrier's route authority.

[8] Just as we do not think it sufficient to resolve the issue in this case by looking to the "plain meaning" of section 401(g), we do not think the Board should be content to rest on the "plain meaning" of the term "supplemental air carrier" in sections 401(e)(6), 401(n), and 406(b). The various provisions of the statute should be interpreted so as to effectuate their underlying purposes, with due regard of course for their language as evidence of those purposes. Since World is apparently willing to waive any charter rights under 401(e)(6) and any right to subsidy under 406(b), these questions of interpretation may never arise. If and when they do arise, however, we leave open the possibility that the term "supplemental air carrier" may properly be given different interpretations with respect to different sections.

The Board also found the prospect of a supplemental carrier acquiring full route authority under section 401(d)(1) or (2) unreasonable in light of the carefully limited circumstances in which individually ticketed service may be obtained as part of a supplemental license.[9] Section 417 of the Act, added by the 1962 amendments, allows supplemental carriers to seek special operating authorizations to engage in *temporary* route service, when the capacity provided by the regular carriers on a given route is temporarily insufficient.[10] Again, however, we

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[9] The Board stated:

> . . . if, as World concedes, Congress has prohibited "supplemental air carriers" from engaging in scheduled service under the supplemental license, it makes little sense to conclude that Congress has, nevertheless, permitted the supplementals to engage in scheduled air transportation by acquiring a route certificate.

Docket 27693, *supra*, at 11. Litigation over the proper definition of "charter trips" has also focused on the congressional purpose to prevent supplemental carriers from engaging in individually ticketed service pursuant to their supplemental certificates. *See* note 2 *supra*.

[10] Section 417 provides in relevant part:

> (a) If the Board finds upon an investigation conducted on its own initiative or upon request of an air carrier—
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> (1) that the capacity for air transportation being offered by the holder of a certificate of public convenience and necessity between particular points in the United States is, or will be, temporarily in-

are unable to see the alleged inconsistency. It is one thing to limit the incidents which flow directly from supplemental certification; it is another thing entirely to eliminate the possibility of acquiring an additional bundle of rights, upon satisfaction of the requirements for a different type of certificate.

III

We think the legislative history of section 417 supports our conclusion that Congress was merely concerned

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sufficient to meet the requirements of the public or the postal service; or

(2) that there is a temporary requirement for air transportation between two points, one or both of which is not regularly served by any air carrier; and

(3) that any supplemental air carrier can provide the additional service temporarily required in the public interest;

the Board may issue to such supplemental air carrier a special operating authorization to engage in air transportation between such points.

(b) A special operating authorization issued under this section—

(1) shall contain such limitations or requirements as to frequency of service, size or type of equipment, or otherwise, as will assure that the service so authorized will alleviate the insufficiency which otherwise would exist, without significant diversion of traffic from the holders of certificates for the route;

(2) shall be valid for not more than thirty days and may be extended for additional periods aggregating not more than sixty days; and

(3) shall not be deemed a license within the meaning of section 1008(b) of Title 5.

49 U.S.C. § 1387(a), (b) (1970).

with delimiting the rights which attach to supplemental certification, and did not intend to preclude applications for regular route authority. The bill originally passed by the Senate contained a provision allowing the Board to grant permanent scheduled authority—in addition to special operating authorizations under section 417—as part of a supplemental license, but this authority would have been subject to Board controls on the number of flights permitted during any given time period. *See* S. REP. No. 688, 87th Cong., 1st Sess. at 1-2, 14-15 (1961). The House Commerce Committee deleted the additional Senate provision and confined the supplementals' individually ticketed authority to that arising under section 417. *See* H. REP. No. 1177, 87th Cong., 1st Sess. at 11-12 (1961). The Conference Committee adopted the House version with regard to this issue. H. REP. No. 1950, 87th Cong., 2d Sess., at 14 (1962).

The Board read the repudiation of the Senate provision as clear evidence of a congressional intent to preclude supplemental air carriers from obtaining scheduled route authority. We think the House Committee's report makes clear, however, that the Senate provision was rejected out of a desire to preserve the basic regulatory framework of sections 401(d)(1) and (2). The House Committee relied explicitly on this court's decision in *United Air Lines, Inc. v. CAB*, *supra*, 278 F.2d 446, which had rejected, as contrary to the pre-1962 version of the Federal Aviation Act, numerical limitations on individually ticketed flights offered by supplemental carriers. *See id.* at 448-49. The Committee Report called this holding "fundamental" to the "regulatory philosophy" of the Act, stating that the Board's responsibility is to determine the general need for competition, not to assign specific numbers of flights to particular carriers. While "supplemental" route authority might pose a danger of unfair competition to regular carriers,

full route authority acquired upon satisfaction of the 401(d)(1) or (2) prequisites would, by definition, constitute fair competition.[11] Indeed, the Committee Report,

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[11] The House Report provided in relevant part:

> The scheduled carriers opposed any authority for supplementals to conduct individually ticketed operations as a serious threat to the health and prosperity of the scheduled industry, citing the poor earnings of the scheduled carriers for the past 5 years. A witness for the industry testified that in 1960 the 12 domestic trunklines had a net profit of $1,188,000 on gross operating revenues of almost $12 billion.
>
> *Regulatory concepts of existing law*
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> *The so-called certificates issued by the Civil Aeronautics Board to the supplementals were illegal. This illegality was not a mere technical infraction of the act. It was fundamental. The 10-flight individually ticketed grant violated basic principles of the economic regulatory philosophy of the Federal Aviation Act of 1958.* Thus, the act recognizes that a carrier's ability to provide good public service should not be hampered by artificial limits on the number of regular schedules for ticketed traffic it can operate over its routes. The act rejects the restrictionist philosophy prevalent in some foreign countries that a governmental bureau should divide the market by assigning each carrier an allowed number of flights.
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> The committee has carefully considered the testimony and all available evidence and failed to find any sound reason why these fundamental principles of the act should be changed. From the standpoint of good public service, and from the standpoint of opportunity for each carrier to compete and develop its business, any air carrier certificated to operate individually ticketed service over a route should be able to do so without CAB-imposed limitations on the frequency of service. *If there is room for competition over a route, the CAB has authority in section 401 to certificate additional carriers. If there is not room for such competition, the Board should not be free to avoid the consequences of competition by limiting the volume of service to be provided by one, some, or all of the carriers in the market.* Moreover, the committee does not consider it either feasible or desirable to authorize an air transport system in which the amount of service is half unregulated.

H. REP. No. 1177, *supra*, at 11-12 (emphasis supplied).

in approving section 417 as a measure necessary to address temporary shortages of route capacity, stated:

> It is the committee's view that the granting of such temporary special operating authority by the Board should not be regarded as constituting any vested right or interest in the route by the carrier so authorized. If the insufficiency of capacity is a chronic problem over the particular route, and can be solved only by an additional carrier, the solution should be in permanent or temporary certification under section 401(d)(1) or (2) of existing law.

H. REP. No. 1177, *supra*, at 12.

Whether considered singly or together, we cannot agree that the "plain implication" of the 1962 provisions is that Congress intended to create two mutually exclusive classes of air carriers. If this intention were really clear from the structure of the legislation, it would be difficult to explain why Congress felt compelled to include the express prohibition in section 401(d)(3) against acquisition of supplemental authority by a regular carrier. At the same time, the Board cannot rely on this express limitation in section 401(d)(3) as a basis for inferring its converse. As the Board concedes, *see* Docket 27693, *supra*, at 4, the restriction on regular carriers was inserted for a specific purpose, to protect the infant supplemental industry from possible domination by the powerful route carriers. Although the legislative history of the provision is rather thin, it fully supports this interpretation.[12]

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[12] The companion bills originally introduced in the House and the Senate, H. R. 7318 and S. 1969 respectively, did not contain any restriction on who could apply for supplemental

certification. Language precluding applications by regular carriers for supplemental certificates apparently was inserted by the Senate Commerce Committee staff following the close of hearings on S. 1969 before the Aviation Subcommittee. *See* Committee Print of S. 1969, 87th Cong., 1st Sess. (July 10, 1961). In reporting the bill out to the full Senate, the Commerce Committee amended the earlier Committee Print to include the precise restrictive language now appearing in section 401(d)(3). *See* S. REP. No. 688, *supra*, at 2.

The most directly relevant materials appearing in the hearings before the Aviation Subcommittee are the following exchanges, first, between Senator Monroney and the Chairman of the CAB, Alan S. Boyd and, second, between Senator Cotton and Mr. Boyd:

> *Senator Monroney.* Assuming enactment of S. 1969, does the Board contemplate consolidating into a single proceeding applications for regular and supplemental certificates?
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> *Mr. Boyd.* No sir. That, as I understand it, would be legally possible, but we have no contemplation of that.

Hearings on S. 1969 Before the Aviation Subcomm. of the Senate Committee on Commerce, 87th Cong., 1st Sess. 29 (June 26-30, 1961).

> *Senator Cotton.* Under this bill [S. 1969] could a regularly certificated carrier also apply for a certificate as a supplemental carrier?
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> *Mr. Boyd.* Yes, sir.
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> *Senator Cotton.* Is it conceivable that the CAB would ever permit a regularly certificated carrier to have a certificate as a supplemental carrier as well?
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> *Mr. Boyd.* I can only say that the Board has no contemplation of such a possibility, Senator Cotton.
>
> *Senator Cotton.* At present, a carrier could not form a separate corporation which would be in a sense controlled by it, to attempt to go into the supplemental carrier business. Is that correct?
>
> *Mr. Boyd.* Absolutely. We have very good safeguards.
>
> *Senator Cotton.* And that is legally provided against, and is the subject of checking constantly by the CAB?
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> [Continued]

The Board argues that Congress could not have meant the possibility of holding both regular and supplemental authority to turn on which type of certificate is obtained first. In its written opinion the Board reasoned:

> . . . if a prospective new entrant into air transportation filed simultaneous applications for route and supplemental certificates it could not be awarded both certificates if the route case were decided first because it would then be a scheduled carrier seeking a supplemental certificate—the very situation which World concedes the language of the Act prevents. On the other hand, again pursuant to World's views, the Board could grant the new entrant both certificates if the Board decided the supplemental certificate case before the route case. Frankly, we think that it is inconceivable that Congress could have meant that such arbitrary procedural circumstances should control the fundamental role that a carrier should play in the air transportation system.

Docket 27693, *supra*, at 7. The simple answer is that the Board should not arbitrarily determine which application to consider first, but should exercise its discretion so as to carry out the limited statutory purpose of protecting supplemental carriers from domination by regular carriers. We presume, for example, that a prospective new entrant would have a strong case in favor of having the supplemental application considered first, if the route authority at stake would not be significant enough to raise a danger of undue domination. Of course, if the route application were filed subsequent to award of the supplemental certificate, then the problem would

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[12] [Continued]

Mr. Boyd. Yes, sir.

Id. at 33. In addition, Senator Sparkman appeared as a witness and expressed his feeling "that this committee should make every effort to protect the supplemental airlines, the true small businesses of civil aviation." *Id.* at 122.

not arise.[13] And, in any event, the supplemental carrier will have to convince the Board that its supplemental responsibilities will not be neglected if it acquires route authority.

We reverse the order of the Board dismissing petitioner's application, and remand for proceedings not inconsistent with this opinion.

It is so ordered.

[13] World argues that if it were to acquire route authority it could apply for renewal of its temporary supplemental authority under section 401(g), 49 U.S.C. § 1371(g) (1970), and would not be constrained by the restriction in section 401(d)(3). It is unnecessary to decide this question, given the posture of the case before us. We note, however, that World's permanent supplemental authority would not be affected by the 401(d)(3) restriction.

APPENDIX III

76-1-88

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

DOCKET 27693

Served: January 23, 1976

Application of World Airways for a Certificate of Public Convenience and Necessity

Decided: January 23, 1976

World Airways' application for a certificate to engage in transcontinental regularly scheduled route service dismissed. *Held:* The Board does not have authority to issue a supplemental air carrier certificated route authority without requiring the surrender of carrier's authority to engage in supplemental air transportation.

APPEARANCES:

Frank J. Costello and *Jerrold Scoutt, Jr.*, for World Airways.
J. Kerwin Rooney for Oakland Parties.
Reuben B. Robertson, III for Aviation Consumer Action Project.
Alexander P. Humphrey, IV for U.S. Department of Transportation.
Elliott M. Seiden for Department of Justice.
Ky P. Ewing, Jr. for American Airlines and Trans World Airlines.
Howard A. Pulsifer for United Air Lines.
Ronald B. Natalie for Northwest Airlines.

Jerry W. Ryan for Braniff, Eastern, National, Pan American and Western.
Paul S. Quinn for the American Society of Travel Agents.

OPINION

By The Board:

Background and Conclusions

The central focus of this opinion is on whether the Board may lawfully issue a route certificate to a supplemental air carrier without requiring the surrender of the carrier's supplemental authority.

The legal question has been raised in connection with World Airways' application in this docket for a certificate of public convenience and necessity to provide scheduled air transportation between the coterminal points Newark, N.J. and Baltimore, Md., on the one hand, and Oakland and Ontario, Calif., on the other hand. World proposes a high-density, high-load-factor service, featuring a one-way fare of $89.00 per passenger and a number of marketing innovations. World has also filed a motion for an expedited hearing on its application.

Answers in support of World's motion were filed by numerous governmental, civic and private entities, and by United Air Lines (one of the three scheduled carriers in the transcontinental markets). Answers in opposition were filed by American Airlines and Trans World Airlines (the other two incumbents) and by Northwest Airlines. Each of the three objecting carriers raised as a threshold issue the question of whether the Act bars a supplemental air carrier from receiving a route certificate.

In Order 75-7-2, the Board stated that in view of the legal objections presented it perceived an obligation on its part to render an interpretation of its statutory authority,

and that it would be more conductive to the orderly administration of its business if the legal issues were settled before an evidentiary hearing was undertaken. Accordingly, the Board requested the filing of briefs by interested persons on the following issues:

1. Whether the Board may issue a certificate for regular route air transportation under section 401(d)(1) or (2) of the Act to a carrier holding a certificate for supplemental air transportation under section 401(d)(3) of the Act without requiring the surrender of the latter.
2. Whether the Board may issue an exemption under section 416 of the Act to World to perform the scheduled air transportation proposed in World application.

The Board also stated that if it determined that it had the legal authority to grant the relief requested it would set World's application for expedited hearing because, *inter alia*, the application is unique and could have far-reaching consequences. However, the Board explained that if it determined that it had no such authority, it would dismiss World's application. "Such action would enable World to seek judicial review. . . ." Order 75-7-2, p. 3.

American and Trans World, the American Society of Travel Agents (ASTA), the Aviation Consumer Action Project (ACAP), "Certain Trunkline Carriers"[1] the Departments of Justice (DOJ) and Transportation (DOT), Northwest, the "Oakland Parties,"[2] Overseas National Airways and Saturn Airways, Trans International Airlines, United, and World Airways have filed briefs in re-

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[1] *I.e.*, Braniff Airways, Eastern Air Lines, National Airlines, Pan American World Airways, and Western Air Lines.

[2] *I.e.*, The City of Oakland, Calif., Port of Oakland, and the Oakland Chamber of Commerce.

sponse to the Board's order. Oral argument has been heard, and the legal issues stand submitted for our decision.

After full consideration of all matters presented, the Board is of the opinion that as a matter of law it does not have the authority to issue a route certificate to a supplemental air carrier without requiring the surrender of the carrier's supplemental authority.[3]

We now turn to a discussion of our findings and conclusions.

2. *General Considerations—Section 401(d)(3) of the Act*

Section 401(d) of the Act authorizes the Board to issue two types of air transportation certificates: (1) certificates to engage in regularly scheduled air transportation (401 (d)(1) and (2)), and (2) certificates to engage in supplemental air transportation (Section 401(d)(3)). Section 401(d)(3) provides:

> (3) In the case of an application for a certificate to engage in supplemental air transportation, the Board may issue a certificate, to any applicant not holding a certificate under paragraph (1) or (2) of this subsection, authorizing the whole or any part thereof, and for such periods, as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform the transportation covered by the application and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder. Any certificate issued pursuant to this paragraph shall contain such limitations as the Board shall find necessary to assure that the service rendered pursuant thereto will be limited to supplemental air transportation as defined in this Act.

[3] Since the Board has concluded that it may not lawfully authorize a supplemental air carrier to simultaneously hold a route certificate, and since World has not applied for exemption authority and has manifested no intention of doing so, we shall lay the 416 question aside here without further comment, and shall focus our discussion on the dual certification issue.

World's principal contention is that Section 401(d)(3) clearly and unambiguously does not prohibit a supplemental air carrier from simultaneously holding route authority. Thus, it maintains that the "plain meaning of this provision is that a scheduled carrier may not obtain a supplemental certificate, not vice versa . . .," and "[m]ore importantly, the route certification provisions, Section 401 (d)(1) and (2), do *not* contain any limitation on who may obtain a certificate other than the standard requirement that the applicant be fit, willing and able. In World's opinion, this should be dispositive of the question."[4]

Although World argues that the Board need not look beyond the literal language of Section 401(d)(3), it nevertheless also maintains that the legislative history is consistent with its position. In World's view that history shows that Congress deliberately barred route carriers from acquiring supplemental certificates, but contains nothing that indicates that Congress intended to bar the reverse situation.

It may be conceded that a literal reading of Section 401(d)(3) supports World's position. However, we do not agree with World that the literal language of that statutory provision is in the circumstances presented dispositive of our legal inquiry. On the contrary, as World itself appears to recognize, and as the usual canons of statutory construction otherwise require, the language of that statutory provision must be read in consonance with other aids to statutory interpretation in order to discover its true legislative intent or meaning. Indeed, it is a recognized

[4] World Brief at 3 & 6.

principle of statutory construction that if the literal import of a statutory provision is inconsistent with legislative intent, or leads to unreasonable results, the words of the statutory provision must be modified by the intent of the legislature. *United States* v. *American Trucking Assoc., Inc.* 310 U.S. 534 (1940). *Southland Gasoline Co.* v. *Bayley,* 319 U.S. 44 (1943); *Chicago and Southern Air Lines, Inc.* v. *Waterman Steamship Corp.,* 333 U.S. 103 (1948); *Mastro Plastics Corp.* v. *Labor Board,* 350 U.S. 270 (1956).

Applying this principle, we find that our empowering legislation does not permit an air carrier to simultaneously hold certificates for regular route and supplemental air transportation. As we shall demonstrate, the concept of dual certification cannot be reconciled with pertinent provisions of the Act and, if accepted, would produce arbitrary and unreasonable results which Congress could not have intended. Moreover, the plain implication of these provisions is that Congress intended to create a distinction between supplemental and route carriers and, pursuant to that distinction, intended to prevent the same carriers from simultaneously engaging in regular route and supplemental air transportation. The legislative history supports this statutory interpretation. It demonstrates that Congress, in passing these amendments, contemplated a broad regulatory scheme whereby supplemental air carriers would be certificated as a separate and distinct class of air carrier specializing in "charter trips." On the one hand, Congress (as correctly noted by World) protected the supplemental class from possible domination by the larger route carriers by prohibiting the route carriers from acquiring certificates to engage in supplemental air transportation. On the other hand, Congress prohibited the supplemental air carriers from engaging in regularly scheduled air transportation pursuant to a certificate of public convenience and necessity in order to ensure that the newly created class would "supplement," *i.e.,* comple-

ment, not duplicate, the service provided by the regular route carriers. Finally, we believe the postenactment history of the 1962 supplemental legislation demonstrates that the statutory mandate limiting supplemental air carriers to charter service has been clearly understood by the courts, and, in fact, by Congress in subsequent legislation.

We now turn to a detailed consideration of our findings and conclusions.

Dual Certification Cannot be Reconciled With Either the Letter or the Purpose of the 1962 Amendments to the Act.

It is a cardinal rule of statutory interpretation that a section of a statute is not to be read in isolation from the content of the whole Act, and that the courts are guided by the provisions of the whole law. *Mastro Plastics Corp.* v. *Labor Board, supra; United States* v. *American Trucking Assoc., Inc., supra; Labor Board* v. *Lion Oil Co.,* 352 U.S. 282 (1957); *Richards* v. *U.S.* 369 U.S. 1 (1962). As the Supreme Court explained in *Power Comm'n.* v. *Panhandle Eastern Pipe Line Co.,* 337 U.S. 498, 514 (1949): "If possible, all sections of the Act must be reconciled so as to produce a symmetrical whole." Accordingly, when Section 401(d)(3) is read in *pari materia* with other relevant sections of the Act, especially those that were contemporaneously enacted with Section 401(d)(3), we believe it is evident that Congress intended that the supplemental air carriers should provide a separate and distinct class of service and intended to prevent the same carrier from simultaneously holding certificates authorizing regular route and supplemental air transportation.

To begin with, Section 401(a)(6) of the Act had authorized those carriers holding certificates issued under Section 401(d)(1) or (2) to engage in charter trips and special services without regard to the points named in their certificates. The 1962 supplemental air carrier legislation

amended this section to deny supplemental air carriers this authority. Section 401(n) of the Act either authorizes, or imposes, a number of special requirements relating to supplemental air carriers that are not applicable to route carriers. These include provisions relating to insurance, minimum service, and "continuing fitness." Section 406(b) had authorized the payment of subsidy for all carriers. That section was also amended by the 1962 supplemental legislation to preclude subsidy for supplemental air carriers. If World were to receive a certificate under Section 401 (d)(1) or (2) and at the same time was permitted to retain its supplemental certificate, it would still be a supplemental carrier by definition. The wholly anomalous result would be that the carrier would at one and the same time be (a) granted and denied Section 401(e)(6) authority; (b) subject to and not subject to Section 401(n) requirements; and (c) eligible and not eligible for subsidy. We think these sections demonstrate that Congress did not intend to permit the same carrier to hold both route and supplemental air carrier certificates. Indeed, no citations are needed for the proposition that statutes are to be construed to avoid unreasonable, let alone absurd, results.

World maintains that its interpretation of Section 401 (d)(3) and the provisions of Sections 401(e)(6) and 406(b) are "capable of coexistence," since the latter may be read as applicable *either* to World's route *operations* or to its supplemental *operations*. However, Sections 401 (e)(6) and 406(b) permit no such reasonable construction. They unequivocally speak to supplemental *air carriers,* not supplemental *operations,* and create a clear distinction between the supplemental and route carrier classes by prohibiting supplemental air carriers from receiving benefits and engaging in services specifically reserved for the route carriers. Similarly, Section 401(n) reinforces what we perceive to be the intended distinction between the classes by imposing certain unique requirements on supplemental air carriers, not merely supplemental operations.

It is equally significant that Congress, in enacting Section 417, appears to have contemplated special conditions which must be met before a supplemental carrier can perform individually ticketed service—conditions which World describes as "extraordinary." The existence of Section 417 confirms the manifest statutory distinction between supplemental air carriers and route carriers and provides equally strong evidence that Congress did not intend supplemental carriers to perform route transportation on a regular basis.

Finally, a number of trunk carriers maintain that World's interpretation of Section 401(d)(3), if accepted, would produce a further anomaly. Specifically, it is argued that if World obtains a route certificate it could not, thereafter, be issued new or renewed authority because Section 401(d)(3) literally prohibits the issuance of a supplemental certificate to a carrier holding route authority.[5] World disagrees, arguing, *inter alia,* that section 401(g), not 401(d), governs renewed or expanded supplemental authority. Therefore, in its view, a supplemental carrier may obtain a route certificate under 401(d)(1) or (2), and later seek new or renewed supplemental authority under section 401(g). We believe that World's argument elevates form above substance. For example, pursuant to World's views, if a prospective new entrant into air transportation filed simultaneous applications for route and supplemental certificates it could not be awarded both certificates if the route case were decided first because it would then be a scheduled carrier seeking a supplemental certificate—the very situation which World concedes the language of the Act prevents. On the other hand, again pursuant to

[5] Significantly, World's overseas and foreign supplemental air transportation authority are temporary. That carrier seeks renewal of that authority and new supplemental authority in the Supplemental Renewal Proceeding, Docket 23944, while it contemporaneously seeks route authority in this proceeding.

World's views, the Board could grant the new entrant both certificates if the Board decided the supplemental certificate case before the route case. Frankly, we think that it is inconceivable that Congress could have meant that such arbitrary procedural circumstances should control the fundamental role that a carrier should play in the air transportation system. In our judgment, there is considerable merit in the trunk carriers' contention that the issuance of route authority to World could potentially vitiate much of World's supplemental air carrier authority and that this result cannot be reconciled with the Congressional purpose of certificating supplemental air carriers.

In summary, it is our conclusion that the language of those statutory provisions which are relevant and material to resolution of the legal question at issue establish that a single carrier may not simultaneously hold one certificate issued under Section 401(d)(1) or (2) and another issued under Section 401(d)(3). On the other side of the coin, it is evident that World's contrary interpretation of the law would produce arbitrary and unreasonable results that Congress could not have intended.

Board Policy and Practice Prior to the 1972 Supplemental Air Carrier Legislation Precluded Dual Certification.

Prior administrative policy and practice represents another accepted source of guidance in determining how statutes should be construed and applied. *Transcontinental and Western Air, Inc.* v. *C.A.B.*, 336 U.S. 601 (1948); *Delta Air Lines* v. *Summerfield*, 347 U.S. 74 (1954); *W. T. Grant Co.* v. *Fleming*, 159 F.2d 720, 723 (U.S. Em. Ct. App., 1946). It is significant, therefore, that it was the Board's policy for a period antedating the 1962 supplemental air carrier legislation to preclude dual certification.

For example, in 1955, the Board issued its decision in the so-called "public interest" phase of the *Large Irregular*

Air Carrier Investigation, 22 C.AB. 838. It determined that the large irregulars, thereafter to be called supplemental air carriers, should be permitted to conduct expanded operations and, pending disposition of the remaining phases of the proceeding, it granted all applicants an exemption authorizing the new operations. This grant was subject, however, to the following condition:

> "4. That the exemption . . . shall terminate 60 days after the Board makes a final disposition of the application or applications of each such carrier in this proceeding: *Provided, however, That in the event a certificate of public convenience and necessity is issued to any supplemental air carrier the exemption granted herein to such carrier shall terminate on the date such certificate becomes effective.*" (22 C.A.B. at 876, emphasis added).

One of the carriers receiving this exemption was *Trans Caribbean* (TCA). By the time the Board decided the remaining phases of the case, granting certificates for supplemental operations to the carriers found qualified, TCA had received a certificate as a regular route carrier. With respect to its application in the *Large Irregular* case, the Board said (*Large Irregular Air Carrier Investigation*, 28 C.A.B. 224, 255 (1959):

> "As regards Trans Caribbean Airways, whom the examiners . . . found well qualified on the facts before them, the Board in its recent decision in the *Service to Puerto Rico Case* [26 C.A.B. 72] certificated this carrier for a route between New York and Puerto Rico. The established policy of the Board is that authorization for irregular or supplemental carriage terminates when the carrier receives a route certificate. This is because supplemental air transportation must retain a character fundamentally distinct from and supplemental to, rather than duplicative of, the serv-

ices provided over the Nation's certificated route network, which is the basic component of our national air transportation system. This distinct and supplemental character would be undermined if carriers which assume the burdens of maintaining portions of the basic route network were to continue to perform significant transportation supplemental to that network. The best energies of a route certificate holder are expected to be devoted to the development of its route, and it would be inconsistent to entertain this expectation if the carrier also holds broad supplemental authority which it is encouraged to exercise to the extent of its capabilities and the available markets."

The Board concluded, therefore, that Trans Caribbean's status as a regular route carrier precluded it from also being a supplemental carrier.

We believe that the Board's historic proscription against permitting the same carrier to hold both regular route and supplemental air carrier authority is entitled to significant weight in the circumstances of this case. First, it is consistent with our finding that the pertinent provisions of the Act preclude dual certificaion. Second, there is little question that Congress in considering the 1962 supplemental air carrier legislation was aware of the Board's policy.[6] Third, there is no evidence that Congress intended to disturb that policy. On the contrary, as we shall now explain the legislative history of the 1962 supplemental air

[6] For example, in dealing with a proposed amendment to the Act involving "grandfather" rights, the Conference Report noted that: "The conference committee is informed that this provision describes an air carrier which was originally certificated as a supplemental carrier and subsequently certificated as a cargo carrier. Under Board Regulations such carrier could not hold two types of certificates; therefore the supplemental certificate initially issued was cancelled." Conference Report, H.R. Report No. 1950, 87th Cong. 2nd Sess. at 15, (1962).

carrier amendments shows that Congress expected that policy to continue.

Legislative History and Postenactment History

In the previous sections of this opinion we have focused primarily on the statute itself and on the Board's policies antedating the passage of the 1962 supplemental air carrier legislation as they bear upon the issues in this case. The history of that legislation adds further support for our conclusion that the Act does not vest in this agency the authority to permit the same carrier to hold regular route and supplemental air carrier authority.

a. *Legislative History—Congress Acts To Prohibit Supplementals From Operating Regularly Scheduled, Individually Ticketed, Services.*

One of the most important, and hotly contested, issues before Congress in connection with the 1962 supplemental air carrier legislation was whether, and to what extent, supplemental air carriers should be permitted to operate regularly scheduled, individually ticketed air transportation services. Prior to the 1962 legislation, the large irregular carriers had been allowed to operate 10 individually ticketed flights per month between any two points in the United States. The 1962 bill submitted by the Board would have permitted the supplementals to continue this type of service on a permanent certificated basis. The Board also supported legislation that would have permitted supplementals to provide individually ticketed services pursuant to "temporary operating authorizations" (*i.e.* a 30-day award under what is now Section 417). The scheduled carriers, on the other hand, supported a bill which would have precluded any scheduled service by supplemental carriers. Both options were considered by the Congress.

Initially the Senate approved legislation permitting the Board to certificate supplementals to provide permanent

individually ticketed operations without any reference to the specific number of flights that they could provide. The Senate's bill would have merely required the Board "to include in the certificate such terms and limitations as it finds are necessary to insure that such services will not result in significant diversion of traffic from the certificated route carriers authorized to render service between the same points."[7]

Explaining this legislation on the floor of the Senate during the initial debate on the Senate version, Senator Monroney (Chairman of the Senate Aviation Subcommittee and floor manager) entered into the following discussion with Senator McCarthy:

> "Mr. McCarthy: I have a question with regard to Section 401 and I pose this question to the Senator from Oklahoma. If that section is retained, could the CAB certificate a supplemental airline to provide scheduled service between New York and Los Angeles, or between any other pair of cities?
>
> Mr. Monroney: Subject to such limitations as were required to protect the scheduled certificated carriers it could. Furthermore, under Section 417 if the number of planes available were inadequate, it might be necessary to authorize daily service for a temporary period by supplemental carriers to supplement the regular service."[8]

The service suggested by Senator McCarthy bears a close resemblance to the service proposed by World in this docket. However, Congress declined to pass the Senate version. Instead it approved the House version of the supplemental amendments which, except for the narrow grant of authority contained in Section 417, limited supplemental

[7] See Senate Report No. 688, 8th Cong., 1st Sess., at 7 (1968).

[8] 107 Cong. Rec. 17165 (August 28, 1961).

carriers to "charter trips. . . ." The Conference Report in its comments on "individually ticketed and waybilled services," explained:

> "Under the House amendment, the term "supplemental air transportation" did not include individually ticketed and waybilled services, therefore supplemental air carriers could not have engaged in such services on a permanent basis. Under the Senate amendment, such term did include individually ticketed and waybilled services and therefore such carriers could have engaged in such services on a permanent basis.
>
> The substitute agreed to in conference adopts the provisions of the House amendment with respect to the prohibition of individually ticketed and waybilled services on a permanent basis."[9]

In sum, Congress had before it bills that would have authorized the Board to certificate a supplemental air carrier to provide service similar to that proposed by World herein. Congress declined to pass that legislation.

We point out that on brief World concedes that Congress has prohibited "supplemental air carriers" from engaging in certificated individually ticketed operations pursuant to their supplemental certificates. However, World argues nonetheless that Congress has not prohibited supplemental air carriers from acquiring route certificates. It cites the following excerpt from the House Report on the 1962 supplemental legislation in support of its proposition:

> "It is the committee's view that the granting of such temporary special operating authority [under Section 417] by the Board should not be regarded as constituting any vested right or interest in the route by the carrier so authorized. If the insufficiency of capacity is

[9] House Report No. 1950, 87th Cong., 2nd Sess., at 14 (1962).

a chronic problem over the particular route, and can be solved only by an additional carrier, the solution should be in permanent or temporary certification under Section 401(d)(1) or (2) of existing laws." [10]

We have two brief comments with respect to World's contention. First, if, as World concedes, Congress has prohibited "supplemental air carriers" from engaging in scheduled service under the supplemental licenses, it makes little sense to conclude that Congress has, nevertheless, permitted the supplementals to engage in scheduled air transportation by acquiring a route certificate. This result would permit World and other supplementals to do indirectly that which the legislative history shows they may not do directly. Similarly, if a supplemental carrier obtains regular route authority, there would be no substantive distinction between the scheduled and supplemental classes—a result which we also believe is inconsistent with Congressional intent. Second, we believe the excerpt from the House Report relied upon by World also permits the inference (which we find more reasonable overall) that the reference to certification under section 401(d)(1) or (2) was intended to cover the ordinary route carriers rather than the supplementals or both the supplementals and route carriers. The fact is that the House version of the 1962 supplemental legislation limited the supplementals to individually ticketed services under Section 417 alone. Indeed, as the House Report itself pointed out as to the new Section 417:

"It would be under this provision of the committee substitute that supplemental air carriers could be authorized to engage in individually ticketed and individually waybilled operations." [11]

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[10] House Report No. 1177, 87th Cong., 1st. Sess., at 12 (1961).

[11] House Report, *supra*, at 18-19.

b. *Postenactment History*

(1) *The Determination of the Courts of Appeals*

In 1966, the Court of Appeals for the District of Columbia Circuit reviewed the Board's award of *domestic* inclusive-tour authority to the supplemental carriers and determined that the Act permitted the Board to authorize supplemental air carriers to provide inclusive-tour charters. *American Airlines, Inc.* v. *CAB.*, 365 F.2d 939 (D.C. Cir. 1966). The court reached its result after conducting an extensive review of the legislative history of the 1962 supplemental legislation. On the basis of that review, the Court stated:

"An overall reading of the legislative history indicates that the three primary purposes of the 1962 legislation were: to eliminate irresponsible supplementals, especially those violating safety regulations; to stabilize the operating authority of the supplementals under certificates, including authority to authorize 'charter trips' on a broad enough basis so that through performance of civilian and military charter operations the supplementals might remain viable economic organizations capable of meeting supplemental transportation needs and able to comply fully with safety requirements; *to maintain the regulatory scheme of the Federal Aviation Act and the protection of the certificated carriers such as the petitioners by eliminating unregulated individually ticketed point-to-point competition from the supplementals.*" [12]

Thereafter, the Board, with the approval of the President, granted *international* inclusive-tour authority and the award of that authority was reviewed by the Second Circuit Court of Appeals. That court, reviewing the same

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[12] American Airlines v. C.A.B., *supra* at 944-5. Footnote omitted, emphasis added.

legislative history, concluded that the term "charter trips" was not intended to embrace inclusive-tour charters. In reaching that conclusion, the court stated:

> "The conflicting House and Senate bills were submitted to a Conference Committee which reported out a substitute bill which was ultimately enacted as Public Law 87-528. The substitute followed the House version, eliminating the definition of the term 'charter' found in the Senate bill. It is clear from the conference report that one purpose of the committee in adopting the provisions of the House bill was to prohibit individually ticketed and waybilled services on a permanent basis. . . ."

Pan American World Airways v. *CAB,* 380 F.2d 770, 779, (2d Cir. 1967). The Supreme Court affirmed the Second Circuit's decision by a divided vote. *World Airways* v. *Pan American,* 391 U.S. 461 (1968).

The difference in judicial interpretation turned on whether or not inclusive-tour charters were "charter trips" within the meaning of the Federal Aviation Act. Implicit in both opinions, however, is the more fundamental notion that supplemental air carriers are limited to providing "charter trips" and may not offer individually ticketed services.

(2) *The 1968 Amendment to the Federal Aviation Act*

In 1968, Congress amended the Act in order to make it clear that supplemental air carriers were authorized to conduct inclusive-tour charters. The House and Senate bills were similar in major respects. Importantly, inclusive-tour charters were codified as a recognized form of charter rather than as an exception to the authorization of "charter trips." See Section 101(34). In the words of the House Report accompanying H.R. 17685:

> "The last sentence of the revised definition of 'supplemental air transportation' was added by the committee to assure that supplemental air carriers could not directly sell or offer for sale tickets for an inclusive tour to individual members of the general public. *In other words, it keeps such carriers out of the business of offering individually ticketed services in competition with the scheduled carriers.* It also prohibits such carriers from making such sales indirectly through a tour operator authorized by the Board to organize and sell an inclusive tour if such tour operator has any interlocking relationship with the carrier or if both the carrier and the tour operator are under common control by any other person. *In short, no supplemental air carrier will be permitted to do indirectly what it is prohibited from doing directly."* [13]

Congress approved the House version of the 1968 supplemental legislation.

Summary

In the previous sections of this opinion we have explained that our inquiry into pertinent statutory provisions, Board policy and precedent, legislative history, and postenactment history discloses that Congress did not intend to vest in the Board the power to authorize supplemental air carriers to hold certificates for regular route and supplemental air transportation. In these circumstances, we find that it is necessary to depart from the literal language of Section 401(d)(3) in order to effectuate legislative intent. Therefore, in consonance with our order inviting comments on the legal issues, we shall dismiss World's application in this docket. Several matters relating to that dismissal warrant comment.

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[13] House Report No. 1639, 90th Cong. 2d Sess. (1968). Emphasis added.

First, World, and those supporting its position, argue that the purpose of the route certification provision of the Act (Sections 401(d)(1) and (2)) is "to open the door to all potential applicants" for air transportation authority, and therefore, that a decision by the Board precluding World from acquiring route authority would be inconsistent with that purpose. World cites *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U.S. 572, 578 (1950) in support of its interpretation of Sections 401(d)(1) and (2). The short answer to World's contention is that whatever the merits of its views of the route certification provisions in other contexts, Congress has, in our judgment, determined that supplemental air carriers shall not, pursuant to Section 401, engage in regularly scheduled air transportation and it is our duty to obey that injunction. It is significant that the court case cited by World was decided prior to the 1962 supplemental legislation, and, of course, does not purport to address the statutory limitation that we have found to exist in this case.

Second, one of the parties to this proceeding opposing World's applications on legal grounds states that even if the Board concludes that it does not have the authority to permit World to acquire a route certificate, it should nevertheless go forward with a full evidentiary hearing on the merits of World's application and reserve decision on the legal issues herein until completion of that hearing. We have rejected that course of action. The proper administration of the Board's business and fundamental standards of fairness in administrative proceedings require that the Board decide the legal issue it has before it now, and in a manner that avoids wasteful expenditures of time, effort and other resources and permits any party to this proceeding to seek timely judicial review of the Board's decision, if so desired. This Board has afforded, and will continue to afford, careful consideration to new service proposals that inure to the benefit of the traveling public

and this nation's air transportation system when such proposals are in accord with statutory requirements. We need not conduct a special proceeding for the purpose of demonstrating our interest in such matters.

Finally, we would emphasize that today's decision addresses only the question of the extent of the legal authority that Congress has vested in the Board under present law. Insofar as it may be argued that the public interest now requires a change in that authority, so as to permit the Board to grant or deny applications such as World's on their individual economic merits, such arguments must of necessity be addressed to the Congress.

Accordingly, in view of the foregoing, we find that:

1. World's application in Docket 27693 should be dismissed.

2. Except to the extent granted or dismissed herein, all motions and requests should be denied and the proceeding in Docket 27693 should be terminated.

An appropriate order will be entered.

ROBSON, *Chairman*, O'MELIA, Vice Chairman, MINETTI, TIMM and WEST, Members, concurred in the above opinion.

Order 76-1-88

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.,
on the 23rd day of January, 1976

Docket 27693

Application of
WORLD AIRWAYS, INC.
for a certificate of public convenience and necessity.

ORDER

Oral argument having been held on certain legal questions arising from the application of World Airways in the above-entitled proceeding, and the Civil Aeronautics Board, upon consideration of the arguments of the parties, having issued its opinion containing its findings and conclusions and decision which is attached hereto and made a part hereof,

IT IS ORDERED THAT:

1. World's application in Docket 27693 be and it hereby is dismissed; and

2. Except to the extent granted or dismissed herein, all motions and requests be and they hereby are denied, and this proceeding be and it hereby is terminated.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND
Secretary

(SEAL)

CIVIL AERONAUTICS BOARD
WASHINGTON, D.C. 20428

Contact: Ron Aaron Eisenberg
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For Release:
On or After
Friday
January 23, 1976
CAB 76-8

CAB DENIES APPLICATION FOR LOW-COST COAST-TO-COAST SERVICE

WASHINGTON, D. C. (January 23, 1976)—The Civil Aeronautics Board today dismissed an application by World Airways to offer scheduled transcontinental air service between Newark, New Jersey and Baltimore, Maryland on the one hand, and Oakland and Ontario, California on the other, for a one-way fare of $89.00 per passenger.

The CAB, in dismissing World's application, said it does not have the authority under the Federal Aviation Act to issue to a supplemental air carrier a certificate to engage in regularly scheduled air transportation as long as the carrier continues to hold its supplemental certificates.

In making this decision, the Board issued the following statement: (Attached))
Order 76-1-88

CIVIL AERONAUTICS BOARD

SUPPLEMENTAL STATEMENT

to Order 76-1-88

January 23, 1976

The Board has today issued Order No. 76-1-88 dismissing World Airways' application to engage in low-fare transcontinental scheduled air service. That order holds that under existing provisions of the Federal Aviation Act the Board cannot grant World Airways a certificate to perform regular scheduled route operations while World continues to hold its existing certificates for supplemental air transportation. From our study of the Act and the legislative history, the Board has determined that no other legal conclusion as to the scope of its authority is possible.

This statutory limitation on the Board's authority, which precludes action on the substantive merits of World's application, or of other similar applications raising the same issue, is a matter which deserves Congressional review.

Significant changes have taken place since 1962, when the provisions which today preclude the same carrier from holding both supplemental and route certificates were adopted. Various regulatory factors may demand greater attention now than was the case at the time of the enactment of these provisions. Careful analysis would, of course, have to be given to the implications of legislative change for the air transport system. However, the considerations which led Congress to mandate a distinct class of supplemental carriers, and in all cases preclude the same carrier from holding both kinds of certificates, may no longer be as persuasive.

On a different point, it would seem that the creation of an economic regulatory agency rests on the determination

that a specialized body with expertise and the necessary regulatory powers will, over time, be best equipped to deal with the complexities and changing economic conditions affecting the subject matter of its jurisdiction. The question here becomes, as a matter of legislative and public policy, how broad a range of matters a regulatory agency should be empowered to determine on their economic and regulatory merits.

These considerations raise the questions whether the existing statutory limitation should not be examined to assess whether it continues to serve important and useful regulatory and public purposes.

Accordingly, without implying a view on the merits of any particular legislative proposal or on any application to provide air service, we believe that an examination by the appropriate Congressional Committees of the need to perpetuate in the present form or alter this limitation would be timely. Without at this time attempting to discuss the various issues, the Board would expect to offer its views on this matter at Congressional hearings which we anticipate will be held later this year on various aspects of the Federal Aviation Act.

Supreme Court, U. S.
FILED
MAR 31 1977
MICHAEL RODAK, JR., CLERK

CORRECTED COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1205

AMERICAN AIRLINES, INC.
TRANS WORLD AIRLINES, INC., *Petitioners*

v.

WORLD AIRWAYS, INC., *Respondent*

BRIEF OF WORLD AIRWAYS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 31, 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1205

AMERICAN AIRLINES, INC.
TRANS WORLD AIRLINES, INC., *Petitioners*

v.

WORLD AIRWAYS, INC., *Respondent*

BRIEF OF WORLD AIRWAYS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

World Airways, Inc. (World) submits this brief in opposition to the petition of American Airlines, Inc. and Trans World Airlines, Inc. (Petitioners) for a writ of certiorari to the United States Court of Appeals, for the District of Columbia Circuit for review of that Court's decision and judgment in *World Airways, Inc.* v. *Civil Aeronautics Board*, Case No 76-1072, entered on December 8, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, review of which petitioners seek, is printed in Appendix II accompanying their petition and has not yet been officially reported.[1] The statement of the Civil Aeronautics Board following the issuance of that opinion, and Order 77-1-94 instituting the *Transcontinental Low-Fare Route Proceeding* (Docket 30356) in response to World's application are printed in Appendices I and II hereof, respectively.

QUESTIONS PRESENTED

The Petition accurately sets forth the single, narrow question of statutory interpretation presented to the Court of Appeals.

STATEMENT OF THE CASE

This case is unusual in one regard and one regard only—there has rarely been a Civil Aeronautics Board order that decided such a narrow legal issue. There are no questions of fact involved, and the policy questions are limited to those in the legislative history, i.e. it does not involve a statutory provision such as the "public interest" that necessarily puts the agency in a policy making role.

The "dual certification" question in a nutshell is this: supplemental, i.e. charter-only, air carriers hold their authority pursuant to Section 401(d)(3) of the Federal Aviation Act of 1958, as amended; scheduled air carriers hold their authority (which includes the right to conduct both scheduled and charter services) [2]

[1] References to the Court of Appeals opinion will be to the slip opinion, cited as "Slip Op."

[2] See Slip Op., p. 7, n. 4.

pursuant to Sections 401(d)(1) or (2); Section 401(d)(3) expressly precludes the holder of a scheduled (Section 401(d)(1) or (2)) certificate from being granted a supplemental certificate; absent any express prohibition, may a supplemental carrier be granted a scheduled certificate? A unanimous Court of Appeals panel, finding that the legislative history confirmed the plain meaning of the statute, answered this question in the affirmative.

For the convenience of the Court, and to give some balance to petitioners' rather one-sided statement of the case, World has set forth below a brief summary of the history of this proceeding.

World first filed an application for transcontinental low-fare scheduled authority in April, 1967. This was the first time that the dual certification question had ever been raised. Although it engendered a great deal of support, as well as opposition, the Civil Aeronautics Board never took any formal action and finally dismissed the application as "stale" some six and one-half years later. CAB Order 73-11-101 (1973). On April 2, 1975 World refiled the application together with a motion for an expedited hearing. On July 1, 1975 the Civil Aeronautics Board, stating that World's application merited expedition but noting that the dual certification question had not yet been resolved, [3] asked for

[3] The question was raised in 1969 in the context of the application of another supplemental carrier for an international scheduled route, but the Board declined to rule on the question choosing, instead, to deny the application on substantive grounds. *Miami-London Route Investigation*, 51 C.A.B. 100, 106, n. 22 (1969). Although a number of bills were introduced that would have clarified Section 401(d)(3) to clearly permit dual certification, prior to 1976 these bills never reached the floor of Congress. The

briefs and oral argument on that question. CAB Order 75-7-2 (1975).

The order at issue in this case, handed down on January 23, 1976, found as a matter of law that a scheduled certificate could not be issued to a supplemental air carrier. World immediately petitioned for review in the D.C. Circuit and that court issued its opinion on December 8, 1976, unanimously reversing the Civil Aeronautics Board. Nine days later the Civil Aeronautics Board issued a statement that "it would not seek further review" and "that its objective is to hear as speedily as possible World's application for authority to provide scheduled transcontinental service." See Appendix I hereof.

On January 14, 1977 the Civil Aeronautics Board by Order 77-1-94 (Appendix II hereof), formally instituted the *Transcontinental Low-Fare Route Proceeding,* Docket 30356, placed World's application at issue in that case and invited all other prospective applicants to seek consolidation. Motions to consolidate transcontinental applications have been filed by a number of companies, including two other supplemental air carriers and three scheduled air carriers. Both petitioners have moved to intervene[4] (as well as a score of

1972 Congressional testimony of the then Chairman of the Civil Aeronautics Board cited by petitioners (Petition, pp. 8-9) was delivered in the context of one of those bills and began with the predicate that the Board had not ruled on the question. Indeed, as the petitioners themselves point out (Petition, p. 9), the present Chairman testified in favor of dual certification at hearings last year. For the disposition of the bills introduced in the 94th Congress, see note 14, *infra.*

[4] Technically, the petitioners are also applicants in the case since they are seeking to put at issue certain existing restrictions on their use of satellite airports.

private and public parties). The next procedural step is an order dealing with the motions and starting the formal hearing process.

This history demonstrates in particular the dangers of regulatory lag, but it hardly reflects petitioners' image of "some 15 years of history, during which no carrier has been permitted simultaneously to hold scheduled-carrier and supplemental-carrier certificates." (Petition, p. 3) True, the statutory distinction between scheduled and supplemental air carriers has been in existence for fifteen years, but the dual certification question was not even raised until the sixth year and the Civil Aeronautics Board spent the next eight years avoiding a resolution of that question. Similar distortions or exaggerations are dealt with in the course of World's argument herein.[5]

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

There are no important reasons for this Court to review the instant case on writ of certiorari and the writ should not be granted. The decision of the Court of

[5] One point not dealt with in the argument proper concerns petitioners' gratuitous remarks concerning the size of World (Petition, p. 5), remarks *not* made to the court below. The petitioners' assertions to the contrary, revenue passenger miles are not a relevant standard for comparing scheduled and charter operations for a variety of reasons which this Court should not be burdened with. Suffice it to say that for the twelve months ended September 30, 1976, World had operating revenues of $69.9 million and the entire certificated supplemental air carrier industry had operating revenues of $417 million. The comparable figures for American and TWA were, respectively, $2.1 and $2 *billion* in operating revenues and the smallest of the "government-subsidized scheduled carriers" referenced by petitioners had operating revenues of $121.5 million. Civil Aeronautics Board, *Interim Financial Report,* (Washington, D.C., December, 1976).

Appeals does not raise an important issue of Federal Law and does not conflict with any decisions of this Court.

I. The Court of Appeals Did Not Decide an Important Issue of Federal Law. It Decided a Narrow Statutory Issue, the Resolution of Which Was Critical for World Airways and a Handful of Other Companies But a Resolution With a Relatively Minor Impact on the Overall Scheme of Federal Air Transportation Regulation.

Petitioners do not run the risk of understatement in their argument that the certiorari jurisdiction of this Court should be invoked because there is an important issue of Federal law involved:

> "... regardless of whether the lower court's interpretation is correct, there can be no question that it alters a basic element of the statutory scheme for regulating air transportation, far transcends the particular facts of the present case, and involves continuing problems in the administration of a key federal statute."[6]

Contrast petitioners' hyperbole with the calm analysis of an unanimous Court of Appeals panel:

> "At the outset, it is important to note the narrowness of the question before us. We are asked merely to decide whether the Board is statutorily foreclosed from considering a supplemental carrier's application for scheduled authority. The absence of a statutory bar does not mean, of course, that a supplemental carrier is entitled to scheduled authority. It does mean that its application for such authority is to be evaluated on its merits, with due consideration to be given to all relevant aspects of the public interest, including the applicant's responsibilities as a supplemental carrier." (Slip. Op. pp. 5-6).

[6] Petition, at 12.

The question decided by the court below was not only narrow in a legal sense, i.e., the court found that the legislative history supported the plain meaning of Section 401(d)(3), it was also very narrow in terms of its policy and factual implications. At most, the court's ruling means that World and the seven other certificated supplemental air carriers can now apply for scheduled certificates—and prior to the court's ruling, they were the *only* persons in the United States to whom that privilege was denied.[7] The immediate result of the ruling is that the Civil Aeronautics Board is free to proceed with World's application for transcontinental authority, and it has done just that by choosing not to seek further review of that ruling and by instituting the *Transcontinental Low-Fare Route Proceeding* in Docket 30356. See Appendices I and II hereof. That proceeding is of considerable significance to World, of course, and it will (hopefully) expand the availability of transcontinental air transportation, but it does not alter the basic scheme of Federal air transportation regulation one whit.

The core of petitioners' argument is that since this Court granted certiorari twenty-seven years ago in a

[7] Petitioners point out that while the court's ruling permits supplemental air carriers to hold dual certificates, scheduled air carriers are still barred from holding supplemental certificates by Section 401(d)(3). As correctly noted by the court below, this is nothing more than a question of semantics since scheduled air carriers are actually "hybrid" carriers, i.e. scheduled certificates convey *both* scheduled and charter authority. (Slip Op. p. 7, n. 4). In briefing the case to the court below, World cited Civil Aeronautics Board statistics which show that more than one-half of all U.S. air charter revenues are generated by scheduled air carriers, and the largest domestic and international charter operators are, respectively, United Airlines, and Pan American World Airways.

case involving an interpretation of Section 401(d), *CAB* v. *State Airlines*, 338 U.S. 572 (1950), it should do so here. The *State Airlines* case is distinguishable for a number of reasons: it was decided when Federal air transportation regulation was still in its infancy; the issue presented—namely, whether the Civil Aeronautics Board could award routes to a carrier other than those described in the carrier's application—was of genuine long-term significance to Federal regulation; the decision of the court below, reversing the route award, severely restricted the Civil Aeronautics Board's decisional flexibility; and the Civil Aeronautics Board was the petitioner. Not one of those circumstances is present in this case.

Petitioners' reliance on the *State Airlines* case in support of its certiorari argument is particularly ironic since the substantative teaching of that case, namely, that "rigid constraints on the Board's ability to consider applications on their merits are generally disfavored" (Slip Op. p. 6), is a central part of the lower court's decision in this case. In truth, petitioners had nowhere else to look for support.

The last time this Court granted certiorari in a case involving an appeal from a Civil Aeronautics Board decision was in 1968, and that was occasioned by a direct conflict among the circuits.[8] Indeed, excluding that case and *State Airlines,* this Court has granted certiorari on only seven other occasions in the thirty-

[8] *World Airways, Inc.* v. *Pan American World Airways, Inc.*, 391 U.S. 461, *reh. denied,* 393 U.S. 957 (1968), aff'g. *Pan American World Airways, Inc.* v. *CAB,* 380 F.2d 770 (2nd Cir. 1967). The D.C. Circuit had reached precisely the opposite result in *American Airlines, Inc.* v. *CAB,* 365 F.2d 939 (D.C. Cir. 1966).

nine year history of the Civil Aeronautics Board.[9] Even more instructive are the cases in which this Court has denied certiorari.[10] In the last two years alone, this Court has denied certiorari in cases involving: the right of passengers to recover fares that were raised unlawfully; the meaning of "competition to the extent necessary" in Section 102, which is the basic Congressional mandate; the reviewability under Section 1006 of a Presidentially approved order that, arguably, was issued illegally; and approval under Section 412 of the Mutual Aid Pact and its consistency with national labor policy and the Railway Labor Act.[11] These cases put petitioners' argument in perspective.

[9] *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961), determining the Board's statutory authority to modify a certificate after its effective date and without notice and hearing; *American Airlines, Inc.* v. *North American Airlines, Inc.*, 355 U.S. 465 (1958) and *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U.S. 79 (1956), interpreting the meaning of "public interest" in Section 411; *Delta Air Lines, Inc.* v. *Summerfield*, 347 U.S. 74 (1954) and *Western Air Lines* v. *CAB,* 347 U.S. 67, *reh. denied* 347 U.S. 924 (1954), determining the boundaries of the Board's subsidy authority under Section 406(b); *Eastern Air Lines* v. *C.A.B.*, 341 U.S. 901 (1951), a *per curiam* decision granting certiorari and vacating the case as moot; and *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948), determining the scope of the President's powers under Section 801 and establishing that all Presidentially approved orders are immune from judicial review.

[10] This Court has denied certiorari in sixty-one cases involving an appeal from a Civil Aeronautics Board order, beginning with *Cameron* v. *CAB,* 323 U.S. 716 (1944).

[11] *Moss* v. *CAB,* 521 F.2d 298 (D.C. Cir. 1975), *cert. denied,* 424 U.S. 966 (1976); *Continental Air Lines, Inc.* v. *CAB,* 519 F.2d 944 (D.C. Cir. 1975), *cert. denied* 424 U.S. 958 (1976); *Diggs* v. *CAB,* 516 F.2d 1248 (D.C. Cir. 1975), *cert. denied* 424 U.S. 910 (1976); *Air Line Pilots Association International* v. *CAB,* 502 F.2d 453 (D.C. Cir. 1974), *cert. denied* 420 U.S. 972 (1975).

In the final analysis, petitioners are asking this Court to make an exception to the general principle that certiorari jurisdiction will "be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co.* v. *Wolf Brothers and Co.*, 240 U.S. 251, 258 (1915) (citations omitted). This is simply not such a case.

II. The Court of Appeals Decision Does Not Conflict With the Principle That Judicial Deference Is Owed an Administrative Construction of a Statute. That Principle Is Simply Inapplicable in This Case.

When the Civil Aeronautics Board dismissed World's application on the grounds that Section 401 (d)(3), by implication rather than by its plain meaning, prohibits a supplemental carrier from acquiring scheduled authority, it was the first and only time that the Board has ruled on this question. Petitioners' argument that the court below failed to accord proper deference to the Board's construction of the statute is tantamount to an argument that *de novo* statutory interpretations by administrative agencies should be immune from judicial review. The plain truth is that deference is not owed to the Board's interpretation, either by the court below or by this Court.

The principle of judicial deference may well be "venerable" as petitioners contend, but it has far from general applicability. This Court has clearly defined the circumstances under which deference to an administrative construction of a statute is appropriate, and not one of those circumstances is present in the instant case.

First, the agency construction must involve an area of its presumed expertise, an area of administrative

policy rather than a "narrow legal issue . . . peculiarly reserved for judicial resolution". *Piper* v. *Chris-Craft Industries, et al.*, 45 U.S.L.W. 4182, 4193, n 27 (U.S. February 23, 1977); *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970). The two cases chiefly relied upon by petitioners, *Red Lion* and *Columbia Broadcasting*,[12] provide an example of the type of situation in which the broad scope of the question framed,[13] necessitated the application of agency expertise and the principle of judicial deference. The case presented to the court below, however, involves a narrow question of statutory construction that begins with the literal meaning of Section 401(d)(3), a meaning that is both clear and unambiguous. In such circumstances expertise rests with the courts, not with the Civil Aeronautics Board, and the principle of deference is inapplicable. See *Shea* v. *Vialpando*, 416 U.S. 251, 262, n. 11 (1974).

The second circumstances giving rise to judicial deference is when "an agency has rendered binding, consistent, official interpretations of its statute over a long period of time". *Piper* v. *Chris-Craft, supra*, 45 U.S.L.W. 4193, n. 27 (citations omitted); *Chemehuevi Tribe of Indians* v *FPC*, 420 U.S. 395, 409-410 (1975) This is particularly true when the administrative interpretation is adopted soon after passage of the legislation. See *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408 (1961). The stat-

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[12] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973).

[13] At issue in both of these cases was the meaning of the term "public interest" as used in the Communications Act. (Tit. III, 48 Stat. 1081, as amended, 47 U.S.C. § 301 *et seq.*)

utory provision at issue in the court below was enacted in 1962. The one and only interpretation of that provision by the Civil Aeronautics Board was that contained in Order 77-1-88, decided on January 23, 1976.

The only other circumstance appropriate for judicial deference is when there is evidence of Congressional acquiesence in the administrative construction. See *Red Lion Broadcasting* v. *FCC, supra,* 395 U.S. at 381; *Zemel* v. *Rusk,* 381 U.S. 1, 11 (1965). Although the petitioners make a passing reference to the attempts to resolve the so-called "dual certification" question in the last Congress, they do not, and could not, seriously allege that Congress in any way acquiesced in the Civil Aeronautics Board's construction of Section 401(d)(3).[14]

In sum, no deference is owed the Civil Aeronautics Board's construction of Section 401(d)(3), and the court below properly refused to give such deference.[15] Indeed, if the court below had accorded deference to that construction, the resulting "judicial inertia"

[14] The petitioners note that proposed dual certification legislation was not enacted, dying when the 94th Congress adjourned *sine die.* (Petition, p. 9). They fail to point out that dual certification bills actually passed in both the Senate and House as part of measures which included other unrelated legislative proposals; and that when, on October 1, 1976, conference agreement on these other proposals could not be reached, the Congress adjourned without taking final action.

[15] Petitioners also chide the court below for failing to even discuss the deference issue. Suffice it to say that the D.C. Circuit has particularlized the factors underlying the doctrine of deference, and when, as here, those factors are not present, "the maxim of deference must inevitably bow before the principle of judicial supremacy in matters of statutory construction." *Wilderness Society* v. *Morton,* 479 F.2d 842, 866 (D.C. Cir.) *cert. denied* 411 U.S. 917 (1973).

would have frustrated the entire review process. See *Volkswagenwork Aktiengesellschaft* v. *FMC,* 390 U.S. 261, 272 (1968), and cases cited therein.

CONCLUSION

From the foregoing it is apparent that there are no serious issues or conflicts posed by this case which warrant this Court's time and attention. None of the important reasons traditionally required by this Court for taking review on writ of certiorari is present. This case is remarkable only for the narrowness of the legal issue and the amount of uncertainty generated by a statutory provision which on its face has not a shred of ambiguity. The unanimous decision of the court below has dispelled the uncertainty and the Civil Aeronautics Board has indicated its agreement with that decision.

WHEREFORE, Respondent respectfully requests the writ of certiorari be denied.

Respectfully submitted,

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March 31, 1977

APPENDIX

APPENDIX I

CIVIL AERONAUTICS BOARD
WASHINGTON, D. C. 20428

FOR RELEASE:

ON OR AFTER
Friday
December 17, 1976
CAB 76-205

Contact: Alan M. Pollock
202/673-5990

Statement of CAB Regarding World Airways Pending Application

WASHINGTON, D. C. (December 17)—The Civil Aeronautics Board today said it would not seek further review of the December 8, 1976 decision of the U.S. Court of Appeals for the D.C. Circuit in *World Airways, Inc.* v. *C.A.B.* The Court held in that case that the Board is not foreclosed by the Federal Aviation Act from considering applications by supplemental carriers for regular scheduled route authority.

The Board said that its objective is to hear as speedily as possible World's application for authority to provide scheduled transcontinental service. In the event that other parties to the litigation seek further review of the Court's decision, the Board will, if necessary, request leave of the Court to proceed with a hearing on the merits of World's application while the legal issue is being finally resolved.

APPENDIX II

Order 77-1-94

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C. on
the 14th day of January, 1977

Docket 30356

Transcontinental Low-Fair Route Proceeding

Docket 27693

Application of WORLD AIRWAYS for a certificate of
public convenience and necessity

Order

By Order 75-7-2, July 1, 1975, the Board announced that it would set the application of World Airways in Docket 27693 for expedited hearing, if it first found that the Federal Aviation Act does not prohibit supplemental air carriers from acquiring scheduled authority. After briefs and oral argument on this threhold question, the Board in Order 76-1-88, January 23, 1976, determined that it did not have the legal authority to issue a route certificate to a supplemental air carrier without requiring the surrender of the carrier's supplemental authority. Accordingly, World's application was dismissed. The applicant appealed and on December 8, 1976, the United States Court of Appeals for the District of Columbia Circuit reversed Order 76-1-88 and remanded the case for hearing.

With the threshold impediment removed, the application is hereby set for expedited hearing as announced in Order 75-7-2. Like the *Chicago Midway Low-Fare Route Proceeding* recently set for hearing in Docket 30277,[1] this case is also unique and complex but its implications are somewhat different from those of *Chicago Midway*. We have, therefore, decided to follow similar procedures by issuing a second order which will (a) define the scope of the proceeding, and (b) designate the route and rate issues to be resolved, including the relationship of World's fare proposal to the requirements of the *Domestic Passenger Fare Investigation*.[2]

In order to expedite the case and eliminate any unnecessary procedural steps, all other applications, motions to consolidate and comments regarding this order must be filed within 30 days of the service date of this order. Answers to motions filed pursuant to this directive will be due 14 days thereafter. Environmental evaluations pursuant to Part 312 of the Procedural Regulations shall be filed by World and any other applicant for authority within 90 days of the date of service of this order.

ACCORDINGLY, IT IS ORDERED THAT:

1. A proceeding to be known as the *Transcontinental Low-Fare Route Proceeding*, Docket 30356, be and it hereby is instituted and set for hearing before an administrative law judge of the Board at a time and place to be designated hereafter;

2. The application of World Airways, Inc. in Docket 27693 be and it hereby is restored to its place on the Board's

---

[1] Order 76-12-149, December 28, 1976.

[2] A staff evidence request will be appended to the order and the parties will be directed to submit comments thereon prior to the prehearing conference. All parties will be free to seek modification or expansion of the request. Because of the need in this case for further expert analysis of the facts and legal issues, no staff component will become a party to the proceeding until the second order has been issued.

docket and consolidated for hearing with the proceeding instituted by paragraph 1 above;

3. Applications, motions to consolidate and comments regarding this order shall be filed within 30 days of the service date of this order;

4. Answers in response to pleadings filed pursuant to paragraph 3 above shall be filed within 14 days thereafter;

5. World Airways and any other applicant for authority shall file an environmental evaluation within 90 days of the service date of this order; and

6. A copy of this order shall be served upon all parties in Docket 27693.

This order shall be published in the Federal Register.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

(SEAL)

Supreme Court, U. S.
FILED
MAR 31 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1205

AMERICAN AIRLINES, INC.
TRANS WORLD AIRLINES, INC., *Petitioners,*

v.

WORLD AIRWAYS, INC., *Respondent.*

BRIEF OF INTERVENORS CITY OF OAKLAND, BOARD OF PORT COMMISSIONERS, AND OAKLAND CHAMBER OF COMMERCE IN OPPOSITION TO THE PETITION FOR CERTIORARI

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March 31, 1977

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BRIEF OF INTERVENORS CITY OF OAKLAND, BOARD OF PORT COMMISSIONERS, AND OAKLAND CHAMBER OF COMMERCE IN OPPOSITION TO THE PETITION FOR CERTIORARI

The City of Oakland, Board of Port Commissioners, and Oakland Chamber of Commerce, intervenors in the court below, submit this brief in opposition to the petition for certiorari filed herein by American Airlines, Inc. and Trans World Airlines, Inc.

STATEMENT OF THE CASE

Petitioners' statement of the case is accurate in its factual respects, but is somewhat confused by being intertwined with argument. The sole issue in the case is one of statutory construction, namely, whether the 1962 amendments to the Federal Aviation Act of 1958

(Pub. L. No. 87-528) should be construed to preclude the Civil Aeronautics Board from issuing, under any circumstances, a certificate for scheduled air transportation to an air carrier holding a certificate for "supplemental" (popularly known as "charter") air transportation. The Board read the statute to tie its hands in this respect, but the court below did not. These intervenors submit that the court below was correct; that, while by either construction the statute is not a model of clarity, its improvement is appropriately for the Congress to undertake; and that, in any event, choice between the two constructions does not rise to the dignity of an important question of federal law which should be settled by this court.

This proceeding arises as follows: On April 2, 1975, respondent World Airways, an air carrier certificated to engage in "supplemental" service, filed an application with the Civil Aeronautics Board seeking certification to perform regularly scheduled transcontinental service between Newark and Baltimore on the East Coast and Ontario and Oakland, California on the West. World contemplated a high volume service, utilizing "satellite" airports, with a low fare. It stated that it would not be willing to surrender its supplemental certificates if granted scheduled route authority. On January 23, 1976, the Board dismissed World's application without reaching the merits, holding that the 1962 amendments to the Federal Aviation Act of 1958 preclude issuance of a certificate for scheduled authority to a carrier holding "supplemental" authority, C.A.B. docket 27693, Order 76-1-88 (Jan. 23, 1976).

Sections 401(d)(1) and (2) of the Federal Aviation Act govern the certification of scheduled route authority, that is, authority to provide individually ticketed service on a schedule.[1] These sections provide that an applicant must be an "air carrier", "fit, willing, and able" to provide the service, and that the requested service must be "required by the public convenience and necessity." "Air carrier" is defined as a "citizen of the United States who undertakes * * * to engage in air transportation * * *", section 101 of the Act, 49 U.S.C. § 1301 (1970).

The 1962 amendments to the Act added section 401 (d)(3), authorizing certification for "supplemental air transportation," defined to include charter but not individually ticketed authority, section 101(36) of the Act, 49 U.S.C. § 1301 (36) (1970). This provision (section 401(d)(3)) requires that an applicant must be "fit, willing, and able" to provide the service, and that the service be "required by the public convenience and

[1] Section 401(d)(1) controls the award of permanent authority, while 401(d)(2) governs temporary authority. These sections provide in full:

> (d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.
>
> (2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provision of this chapter and the rules, regulations, and requirements of the Board hereunder.

necessity"; it also provides that the applicant must not be holding "a certificate under paragraph (1) or (2) of this subsection [section 401(d)]."[2] In other words, an air carrier holding scheduled route authority may not also acquire supplemental authority; but the section does not by its terms bar supplemental carriers from acquiring scheduled authority. As stated by the court below, "The issue in this case thus becomes whether the general purposes of the 1962 amendments would be furthered by reading this converse limitation into the Act." (slip. op. 5)

ARGUMENT

I. Petitioners' Contention That The Court Below Has Failed To Accord Proper Deference To The Administrative Interpretation Is Misplaced.

The primary thrust of the petition is that the court below failed to show proper deference to the interpretation adopted by the Civil Aeronautics Board of "its own statute". This contention would be appealing in the context of a course of discretionary action within the confines of the statute, but it is inapplicable to an

[2] Section 401(d)(3) provides in full:

(d)(3) In the case of an application for a certificate to engage in supplemental air transportation, the Board may issue a certificate, to any applicant not holding a certificate under paragraph (1) or (2) of this subsection, authorizing the whole or any part thereof, and for such periods, as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform the transportation covered by the application and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder. Any certificate issued pursuant to this paragraph shall contain such limitations as the Board shall find necessary to assure that the service rendered pursuant thereto will be limited to supplemental air transportation as defined in this chapter.

interpretation of the statute itself. That is a pure question of law, as to which the courts owe no deference to anybody. Professor Jaffe, a leading commentator on the subject of judicial review, states:

> "The distinction between fact and law is vital to a correct appreciation of the respective roles of the administrative and the judiciary. The administrative is the sole fact finder. * * * On the other hand, the administrative and the judiciary share the role of law pronouncing and law making. They are in partnership. *The court may supersede the administrative and itself determine the question of law; it is the senior partner.*" (Emphasis supplied) Louis L. Jaffe: *Judicial Review: Question of Law,* 69 Harv. L. Rev. 239 (1955).

Mr. Justice Jackson expressed this concept to similar effect:

> "[A]dministrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the Commission in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And *what action is, and what is not, within the law must be determined by courts . . .*" (Emphasis supplied) (Dissenting Op. in *SEC* v. *Chenery Corp.,* 332 U.S. 194, 215 (1947).

It is not true, however, that the court did fail to show "deference" to the Board's interpretation. The care and depth with which the court considered the problem is itself the highest form of deference. The court simply could not reach the same conclusion. Thus, with respect to the crucial question of the construction of the 1962 amendments, the Board relied in part on

the fact that its policy prior to 1962 had been to prohibit an air carrier from simultaneously holding both scheduled and supplemental authority. The court below states as to this

> "With all respect, we do not find the Board's pre-1962 interpretation of the Act persuasive support for its reading of the 1962 amendments. It seems reasonable to suppose that a policy formulated at the time the Board was attempting to justify an exemption of supplemental carriers from the provisions of the Act would not survive the establishment of a clear statutory basis for awarding supplemental certificates. Certainly Congress did not think the prior Board policy was incorporated as such in the 1962 amendments: the express prohibition in section 401(d)(3) against acquisition of supplemental authority by a regular carrier would not have been necessary had Congress thought the Board's policy against dual certification was being carried forward by the legislation. We note, moreover, that until the instant litigation the Board had not formally determined the effect of the 1962 amendments upon its prior policy." (slip. op. 7, n. 5)

Throughout the court's opinion we find the same thoughtful and closely reasoned consideration of the Board's views. These intervenors submit that petitioners' argument as to lack of deference is without substance.

II. The Question Involved Is Not An Important Question Of Federal Law Which Should Be Settled By This Court.

Clearly it was important that the supplemental carriers know whether they were to be forever foreclosed from seeking scheduled carrier status, and it was important to the Board to know the answer to that question, in its administration of the Act. But the question itself is not one of major importance, even to the Board;[3] much less is it of the degree of jurisprudential importance justifying the attention of this court. Justice Brandeis said

> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied . . .". (Concurring opinion in *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 84 (1936).

The question of law here involved has now been decided by a unanimous panel of the federal court most experienced in reviewing the actions of the Civil Aeronautics Board, including the judicial history of this very area, see *American Airlines, Inc.* v. *C.A.B.,* 235 F.2d 845 (D.C. Cir. 1956), cert. denied 353 U.S. 905 (1957), and *United Air Lines, Inc.* v. *C.A.B.,* 278 F.2d 446 (D.C. Cir.), vacated, 364 U.S. 297 (1960). We submit that this narrow question, of first impression, has received considerate and fully adequate attention.

III. The Decision Below Is Clearly Correct.

The Oakland parties submit that the decision below is clearly correct. We do not presume to repeat, or elaborate upon, the court's careful analysis and lucid opinion. We do wish, however, briefly to suggest that the result could also have rested upon a point of construction which Judge McGowan noted but did not rely upon. He states:

> "The Board cited three sections which deny benefits or impose additional requirements on "sup-

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[3] The Board did not petition for certiorari.

plemental air carriers," and found an anomaly in the fact that a carrier holding both route and supplemental authority would be, at one and the same time, "covered and not covered" by these sections. The intervening Oakland parties (the City of Oakland, the Board of Port Commissioners, and the Oakland Chamber of Commerce) urge us to eliminate this "anomaly" by construing these provisions to apply only to supplemental operations rather than to all services performed by an air carrier holding supplemental authority. The Oakland parties support their position by analogy to *National Association of Regulatory Utility Commissioners* v. *FCC,* 533 F.2d 601 (D.C. Cir. 1976), in which this court held that a cable television operator can be a common carrier with respect to some activities, but a non-common carrier with respect to others.

> We find it unnecessary to pass on the validity of the Oakland parties' interpretation, since we fail to see why the provisions in question raise an anomaly at all." (Slip Op. 12-13)

We add only that the Board's refusal here to even consider this contention is on all fours with the position espoused by the Federal Communications Commission in *National Association of Regulatory Utility Commissioners* v. *Federal Communications Commission,* 533 F.2d 601 (D.C. Cir. 1976) (hereinafter *Naruc*). As the court there expressed it:

> "The Commission argues that the two-way, non-video communications via cable, over which it has pre-empted state and local regulation, are not common carrier communications because they are carried on by entities (cable operators) previously

> adjudged to be non-common carriers.[26] 533 F.2d 608.

> "[26] 49 F.C.C. 2d at 1082.
> "It has been held several times that cable systems, operating in the characteristic broadcast retransmission mode, are not common carriers. *United States* v. *Southwestern Cable Co.,* 392 U.S. 157, 169, n. 29 (1968) . . . ."

The court below there rejected the Commission's "holistic view" of cable systems:

> "However, it has long been held that 'a common carrier is such by virtue of his occupation'; that is, by the actual activities he carries on. Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others." *Ibid.*

The Commission in *Naruc* had argued that to treat cable systems, at one and the same time, as common carriers and "noncarriers"

> "would lead to the absurd and illogical conclusion that the Commission has the authority to require the capacity for access cablecasting, including non-voice return communication, but is without authority to regulate the activity." 533 F.2d 614, n. 78.

Similarly here, the Board finds that it would be "unreasonable, let alone absurd" to allow, for example, the same entity to be eligible for subsidy with respect to route operations and ineligible with respect to supplemental operations. The remarks of the court below with respect to the Commission's "holistic view" in *Naruc* are equally applicable to the Board's theory here:

> "Yet the Commission offers no reason, save its own bruised sense of symmetry, in support of this conclusion." 533 F.2d 614.

We submit that the Board's reliance here on its "entity" construction to sustain its conclusion is as unfounded as was the Commission's view of the pervasiveness of the "noncarrier" entity status of TV cable systems in *Naruc*.

CONCLUSION

The Oakland parties accordingly submit that the petition for certiorari should be denied.

Respectfully submitted,

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March 31, 1977

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